



City of Rialto

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Title: Request City Council to Receive and File a Report from the City Attorney regarding Payment of Deferred Compensation to 401(a) Money Purchase Pension and Trust Accounts Due to Eligible Elected City officials serving between July 1, 2014, and the Current Date.

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Date	Ver.	Action By	Action	Result
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For City Council Meeting [December 14, 2021]

TO: Honorable Mayor and City Council

FROM: Marcus Fuller, City Manager

Eric S. Vail, City Attorney

Request City Council to Receive and File a Report from the City Attorney regarding Payment of Deferred Compensation to 401(a) Money Purchase Pension and Trust Accounts Due to Eligible Elected City officials serving between July 1, 2014, and the Current Date.

SUMMARY OF CONCLUSIONS

It was brought to the attention of the City Manager and City Attorney that elected City officials, Mayor, Mayor Pro Tem, Council Members, City Clerk and City Treasurer ("Elected Officials") were not receiving City paid contributions to 401A deferred compensation accounts previously established for Elected Officials and approved by the City Council. It has also been asserted that these payments should have commenced at some time between 2001 and 2014. This Report only addresses paid contributions to a City-established 401A account for Elected Officials and does not address any other retirement or health and welfare benefits.

The Offices of the City Manager and City Attorney undertook an investigation into this matter and having reviewed the relevant City records have reached the following conclusions:

1. There is no evidence (e.g. resolutions, minutes, agreements etc.,) documenting that the City Council authorized Elected Officials to receive the same City-paid contribution to a 401A account as was provided by the City to the City Administrator between June of 2001 and January 2003.

2. In December of 2003, the City Council adopted Resolution 5058 authorizing Elected Officials to receive the same health, welfare and cost reimbursement benefits as received by members of the City Government Management Employee Association ("CGMA") commencing January 1, 2003.
3. Between January 1, 2003 and July 1, 2014, Elected Officials were not entitled to City-paid contributions to a 401A account because Elected Officials were only entitled to receive the same benefit received by members of CGMA and during this time period under their Memorandum of Agreement with the City.
4. Commencing July 1, 2014 through June 30, 2015, Elected Officials were entitled to a City-paid contribution of \$500 per month to a 401A account because this was the benefit received by members of the CGMA during this time period under their Memorandum of Agreement with the City.
5. The City, for reasons that have not been documented or discovered, failed to make these required payments to Elected Officials during July 1, 2014 through June 30, 2015 and these payments remain due to eligible Elected Officials.
6. Commencing July 1, 2015, and through the current date, Elected Officials were entitled to a City-paid contribution of \$750 per month to a 401A account because (a) this was the benefit received by members of the CGMA from July 1, 2015 and thereafter, and (b) this was the City-paid contribution amount authorized pursuant to Council as approved in Resolution 7569 superseding Resolution 5058.
7. The City, for reasons that have not been documented or discovered, failed to make these required payments to Elected Officials during July 1, 2015 through October 2021 and these payments remain due to eligible Elected Officials.
8. City will make payment of amounts due and owing to eligible Elected Officials whose terms fell within the time period of July 1, 2014 through the current date, this includes Elected Officials who served on Council but are no longer on Council.

The City Attorney's office is currently researching the rules for including lost-interest as part of a make-whole payment to affected Elected Officials.

BACKGROUND

The payment of salary, retirement, health and welfare benefits to Elected Officials is regulated by certain sections of the California Government Code. This body of law must be applied to the applicable and documented facts to determine whether Elected Officials are entitled to City-paid contributions to 401A accounts.

Governing law:

Government Code section 36516 provides that councilmembers may only receive the amount of salary set by the statutory formula, unless expressly approved by the voters. Compensation for the City Treasurer and City Clerk are also authorized in Government Code section 36517. However, paragraph (d) of Section 36516 expressly excludes for the calculation of salary, certain retirement

and health and welfare benefits:

“Any amounts paid by a city for retirement, health and welfare, and federal social security benefits shall not be included for purposes of determining salary under this section, provided that the same benefits are available and paid by the city for its employees.”

This means that Elected Officials, as defined in this Report, may receive compensation in the form of retirement benefits, and health and welfare benefits in addition to the statutory limit on salary. Benefits might include CalPERS retirement, deferred compensation, health insurance and others. Government Code sections 53213 through 53214 expressly authorizes cities to establish deferred compensation plans in accordance with Sections 401(a) and 457 of the federal Internal Revenue Code in trust for the exclusive benefit of employees. Government Code 53200 et seq. authorizes the City to provide health and welfare benefits to its officers and employees.

Under these laws, Elected Officials may receive retirement benefits and health and welfare benefits provided that five (5) criteria are met:

1. The City Council must take affirmative action to approve the receipt of the particular benefit - by adoption of a resolution, ordinance, or plan document.
2. The Elected Official must meet any eligibility requirements of the resolution, ordinance, or plan document.
3. The same benefits are available to employees paid by the City to its employees.
4. The benefits received by Elected Officials must not be greater than that received by non-safety employees of the City.
5. The benefits received by the Elected Officials must not be greater than the most generous schedule of benefits being received by any category of non-safety employees.

Council Actions:

Over the course of the past twenty years, the City Council took several actions that are both relevant and important to understanding the evolution of the deferred compensation issue. The concept of a 401(a) plan first arose with the hiring of Henry Garcia in June of 2001, then moved to providing Council with the same benefits as provided to the City Government Management Employees Association (“CGMA”) in 2003, and then finally to the adoption of an Elected Official Benefit Program tying benefits to senior management in 2019. The Council actions are summarized below in chronological order:

- On June 5, 2001, Council adopts Resolution 4760 establishing a 401(a) deferred compensation plan. The first recital states that “***It is the desire of the City of Rialto to establish a 401(A) Deferred Compensation Plan for the City Administrator*** and such other employees as may be designated in the future from time to time by the City Council.” [Emphasis added.] Article 2, Section 2.7 of the Executive Money Purchase Pension Plan and Trust document attached to the Resolution states: “Eligible Employee means Henry Garcia the City Manager of the Employer. **No other employees shall be eligible for this plan unless so approved by the City Council.**” [Emphasis added.] The minutes for the May 22, 2001, meeting reflect that the Resolution was passed unanimously as part of the consent calendar and there are no Council comments with regard to this Resolution or the 401(A) benefit reflected in the minutes (Mayor Vargas, MPT Sampson, Councilmembers Robertson, Hanson and Wilson present).

- On June 5, 2001, as part of the same agenda item as Resolution 4760 noted above, Council approved an Employment Agreement with Henry Garcia for the position of City Administrator. Section 4.G “Deferred Compensation” of the Agreement states: The City Administrator will receive Nineteen Thousand Dollars (\$19,000) in a 401(a) deferred compensation account payable in advance annually within thirty (30) days of June 5, beginning June 5, 2001 and ending June 5, 2004.” The Agreement and section 4.G were extended by means of two separate amendments through December 15, 2010, and the contribution amount was adjusted to reflect the then current contribution limits allowed under federal law with the last amended contribution amount being \$28,000 per year. The Agreement does not reflect an action on the part of the Council to provide Elected Officials this same benefit, nor is there a related resolution wherein Council approved such benefit.
- On December 16, 2003, Council adopts Resolution 5058 providing that “Health, Welfare and Reimbursement Benefits” provided to CMGA members shall also be provided to “Elected City Officials.” Section 1 of Resolution 5058 states that: “Elected officials in the City of Rialto, including City Council Members, the City Treasurer and the City Clerk, shall receive such health and welfare benefits and expense reimbursements as are provided from time to time to the CGMA.”
- On December 16, 2003, Council approves CGMA MOU covering the period 1-1-03 through 6-30-07. Article 6 “Deferred Compensation” reads “Employees will have **access** to the 401A, Money Purchase Pension Plan and Trust, subject to City Council modification of the plan as authorized by federal and state laws.” [Emphasis added.]
- On May 9, 2007, Wayne McAfee and Kriby Warner execute the CGMA MOU covering the period 7-1-07 to 6-30-09. Council approval date could not be accessed in City records. Article 6 “Deferred Compensation” reads “Employees will have **access** to the 401A, Money Purchase Pension Plan and Trust, subject to City Council modification of the plan as authorized by federal and state laws.” [Emphasis added.]
- On or about July 9, 2009, Council approves CGMA MOU covering the period 7-1-09 to 6-30-11. Article 6 “Deferred Compensation” reads “Employees will have **access** to the 401A, Money Purchase Pension Plan and Trust, subject to City Council modification of the plan as authorized by federal and state laws.” [Emphasis added.]
- May 14, 2013, Staff report for new CGMA MOU states that the 7-1-09 to 6-30-11 CGMA MOU was extended by side letters through May 14, 2013.
- On May 14, 2013, Council approves CGMA MOU covering the period 7-1-13 to 6-30-14. Article 6 “Deferred Compensation” reads “Employees will have **access** to the 401(a), Money Purchase Pension Plan and Trust, subject to City Council modification of the plan as authorized by federal and state laws.” [Emphasis added.]
- On August 26, 2014, Council approves CGMA MOU covering the period 7-1-14 to 6-30-15. Article 6 “Deferred Compensation” reads “Employees will have access to the 401A, Money Purchase Pension Plan and Trust, subject to City Council modification of the plan as authorized by federal and state laws. **The City shall contribute five hundred dollars (\$500) per month towards an employee’s deferred compensation plan.** [Emphasis added.] This is the first reference to the Council taking action to pay into CGMA employee’s 401A accounts. The staff report for 8/26/14 cites the reason for the deferred comp paid contribution was to partially make up for CGMA losing 4%

PERS cost of living adjustment through negotiations.

- On July 14, 2015, Council approved CGMA MOU covering the period 7/1/15 to 6/30/16. Article 6 “Deferred Compensation” reads: “Employees will have access to the 401A, Money Purchase Pension Plan and Trust, subject to City Council modification of the plan as authorized by federal and state laws. **The City shall contribute seven hundred fifty dollars (\$750) per month towards an employee’s deferred compensation plan.** [Emphasis added.] The staff report for 7/14/15 again cites the reason for the deferred comp increase was to partially make up for CGMA loss of the 4% PERS cost of living adjustment.
- We have been unable to retrieve any CGMA MOU covering the period July 1, 2016 through October 22, 2019, but based on the records preceding this period, it is reasonable to assume that either the 7/1/15 to 6/30/16 CGMA MOU was extended by side letter or the parties continued to operate under the expired MOU.
- On October 22, 2019 Council approved Resolution 7569 superseding and repealing resolution 5058. This Resolution switched the measure of deferred compensation, and health and welfare benefits for Council, the Treasurer and City Clerk from the CGMA to the “City Administrator” and expressly provided that: “The health and welfare benefits to which elected officials are entitled are enumerated in Exhibit A of the Resolution.” Exhibit A is the 2019 City of Rialto Elected Officials Benefit Profile.” Section 2.06 “Deferred Compensation” is listed in the Profile under Article II “Benefits” which states: **“The City will contribute seven hundred fifty dollars (\$750) per month toward the Elected Official’s deferred compensation plan, which is a 401(a), Money Purchase Pension Plan and Trust.”** [Emphasis added.] The Profile separately enumerates CalPERS retirement benefits under a separate Article.

ANALYSIS/DISCUSSION

It is clear from our review of all of the documents noted above, that when the Council uses the term “health and welfare benefits” it is intended to include deferred compensation and not just typical insurance benefits. The record is replete with examples of this and includes references to CGMA Memorandums of Understanding and the Elected Official Benefit Profile that all place deferred compensation under the heading of “Benefits.”

Applying the five (5) criteria to the 2001 action whereby the City hired Henry Garcia as City Manager and first established the 401(a) account, the first criteria (express action by the Council to give a specific benefit to Elected Officials) cannot be established. Resolution 4760 expressly states that the City paid contribution to the 401(a) account is only being provided to the City Administrator. There is no reference to the City Council or other Elected Official receiving this benefit in any of the other documents. The Employment Contract does not reference the benefit being provided to any Elected Official. Article 2, Section 2.7 of the Executive Money Purchase Pension Plan and Trust document attached to Resolution 4760 states: “Eligible Employee means Henry Garcia the City Manager of the Employer. No other employees shall be eligible for this plan unless so approved by the City Council.” The minutes of the Council meeting at which Resolution 4760 was approved does not reflect any statement by any member of the Council evidencing an intent to apply the benefit to Elected Public Officials.

It is clear that by the adoption of Resolution 5058 in December of 2003 the City Council expressly intended to provide benefits to the Elected Officials. Resolution 5058 provides: “Elected officials in the City of Rialto, including City Council Members, the City Treasurer and the City Clerk, shall receive

such health and welfare benefits and expense reimbursements as are provided from time to time to the CGMA.” This action satisfies all five (5) of the criteria noted above, but the action taken here was to only provide the Council with “such health and welfare benefits” as are provided to CGMA. There was no express declaration or statement that Elected Officials were to receive a “city-paid contribution” and no such benefit was provided to CGMA in 2003. In fact, until 2014 the deferred compensation benefit provided to CGMA was limited to having “access” to a 401(a) account, but without any right to a city-paid contribution.

However, it is clear that on August 26, 2014, Council approved the CGMA MOU covering the period 7-1-14 to 6-30-15 and amended Article 6 “Deferred Compensation to add a specific right to “city-paid contribution” stating “The City shall contribute five hundred dollars (\$500) per month towards an employee’s deferred compensation plan.” Here for the first time, we have an express action by Council granting the CGMA not just access to a 401(a) account, but an actual right to receive a \$500 per month contribution paid by the City. Pursuant to Resolution 5058, the Elected Officials should have received this same benefit / payment at the same time as CGMA members.

The amount of the monthly contribution was increased the following year to \$750 and the Elected Officials should have also received the same benefit. Although the group to which the Council benefits have been linked changed in 2019 with the adoption of Resolution 7569, the contribution amount has remained at \$750 per month.

For reasons that we were not able to determine and could not find documentation for, the City failed to make the required city-paid contribution amounts to Elected Officials commencing July 1, 2014, and continuing thereafter until just recently. The right to these payments was duly approved and established by legitimate action of the Council consistent with the statutory requirements noted above. But for the mistake, error, or oversight of the City, the Elected Officials would have received these payments. We also did not find evidence that the affected Elected Officials has previously received sufficient notice or any notice at all of the right to receive these benefits commencing in 2014. As such, our conclusion is that the payment due beginning July 1, 2014, and carrying forward through the current date, constitutes a legal obligation of City that would be enforceable against the City.

PROPOSED ACTIONS TO CORRECT THE ERROR

The City Manager’s Office has prepared a repayment plan for all affected Elected Officials and will proceed to implement that plan. This will avoid legal action against the City, or at least minimize such action against the City.

The City Manager’s repayment plan also contemplates payment of a certain sum to affected Elected Officials following IRS and DOL guidelines to compensate for lost interest since the July 1, 2014, date. Additionally, the City will be retaining a pension attorney to evaluate the growth and earnings of the principal contributions over the term of each elected official’s account since 7/1/14 in relation to any applicable administrative/management fees that would have applied. The final calculation will be determined after legal analysis of applicable IRS regulations.

Thereafter, the City Attorney’s Office will prepare letters to be sent to all affected Elected Officials notifying them of the actions being taken to remedy the failure of payment.

ENVIRONMENTAL IMPACT

The proposed actions do not constitute a “project” as defined by the California Environmental Quality Act (CEQA). Pursuant to Section 15378(b), a project does not include organizational or

administrative activities of governments that will not result in direct or indirect physical changes in the environment.

GENERAL PLAN CONSISTENCY

This action is consistent with Guiding Principle 3A of the General Plan:

Our City government will lead by example, and will operate in an open, transparent, and responsive manner that meets the needs of the citizens and is a good place to do business.

LEGAL REVIEW

The City Attorney prepared this staff report.

FINANCIAL IMPACT

Operating Budget Impact

Staff has determined the principal amount owed to all elected officials that had not already received a deferred compensation contribution is \$437,500, plus yet to be determined interest earnings over that period. Sufficient Funds are budgeted and available for this item.

Capital Improvement Budget Impact

The proposed action will not affect the Capital Improvement Budget.

RECOMMENDATION

Staff recommends that the City Council Receive and File a Report from the City Attorney regarding Payment of Deferred Compensation to 401(a) Money Purchase Pension and Trust Accounts Due to Eligible Elected City officials serving between July 1, 2014, and the Current Date.