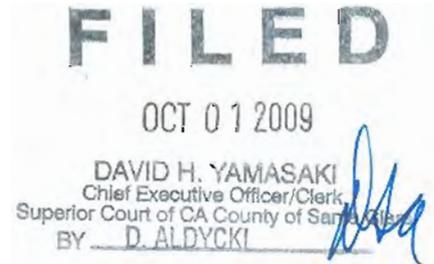


September 28, 2009

Honorable Jamie A. Jacobs-May
Presiding Judge
Santa Clara County Superior Court
191 North First St.
San Jose, CA 95113



Re: Grand Jury Report

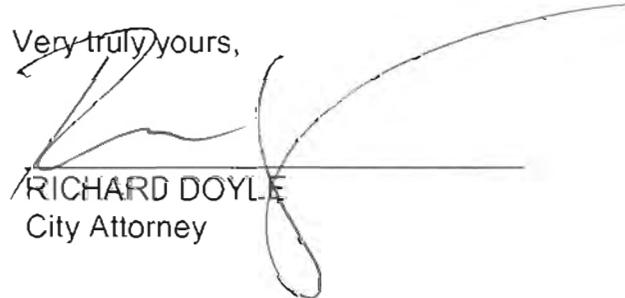
Dear Judge Jacobs-May:

Pursuant to California Penal Code Section 933 et seq., please accept the response of the City Council to the Grand Jury Report submitted by the 2008-2009 Santa Clara County Civil Grand Jury to the City of San Jose entitled "City of San Jose Hosed by IAFF Local 230 Executives." Please note that pursuant to a telephone conversation with Ms. Chacon of your Office, the City received approval to file its response beyond the statutory 90 day time limit.

The City Council approved the response on September 22, 2009 with a motion that made a clarification: Many of the Grand Jury's findings were related to paid time off taken by executives of the firefighters union to conduct union business. The City would like to clarify that the union contract provision that has been interpreted to require the City to provide time off to union executives was the result of negotiations between the City and the union in 1996. The City is obligated to comply with the terms of the union contract provision, as interpreted through arbitration, until the existing provision is modified through the negotiation process. The City is currently in negotiations with IAFF, Local 230 and the City has made a proposal on City-paid union time off.

The approved City response and the Grand Jury Report are enclosed for your review. Please feel free to contact me if you have any questions. Thank you for your consideration.

Very truly yours,


RICHARD DOYLE
City Attorney

Enclosures

cc: Mayor Chuck Reed
Debra Figone, City Manager



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Debra Figone

SUBJECT: SEE BELOW

DATE: September 3, 2009

SUBJECT: SANTA CLARA COUNTY CIVIL GRAND JURY REPORT - CITY OF SAN JOSE HOSED BY IAFF LOCAL 230 EXECUTIVES

RECOMMENDATION

It is recommended that the Mayor and City Council approve this response to the 2008-2009 Santa Clara County Civil Grand Jury Report entitled "City of San Jose Hosed By IAFF Local 230 Executives."

OUTCOME

Approval of this report will satisfy the requirements of Penal Code Section 933(c), which requires the City Council to respond to Civil Grand Jury reports to the presiding judge of the Superior Court.

BACKGROUND

The Santa Clara County Civil Grand Jury provided the City with its final report, including findings and recommendations, entitled "City of San Jose Hosed by IAFF Local 230 Executives." (Please see Attachment A.) According to the report, the subject of the Grand Jury's inquiry was:

"Should the City of San Jose renegotiate its contract with IAFF Local 230 with the focus on eliminating the ability of Local 230 executives to:

- file excessive or frivolous grievances?
- abuse Union Time Off (UTO)?
- avoid actively participating in quarterly labor management meetings and labor Management Initiative Programs?"

The summary of the report indicates that "San Jose firefighters are dedicated, courageous and face great risk every time they respond to an emergency call. This report in no way is intended to reflect on their performance or commitment to public service." The City Council and City Administration agree that San Jose Firefighters are dedicated, professional, well trained and provide exceptional service in emergency response and prevention to the residents of San Jose.

The primary focus of the Grand Jury's findings and recommendations is City-paid union time off for firefighter union officials. The City has in the past and will continue to support reasonable paid time away from normal duties for labor management issues involving the City and the Union. This includes, but is not limited to, City-paid time off from normal duties to participate in contract negotiations, labor management committees, processing grievances and representing employees in various administrative processes. The primary issue reviewed by the Grand Jury is the firefighter's union use of City-paid time off to conduct "union business." It is important to ensure accountability for the use of City funds, particularly in the current economic environment.

GRAND JURY FINDINGS, RECOMMENDATIONS AND CITY'S RESPONSE

Grand Jury Finding 1a

"Union executives are charged with a dual role as both firefighters and union leaders. Given the number of hours they spend on UTO, the President and Executive Vice President of Local 230 only nominally serve their firefighter role."

Grand Jury Finding 1b

"In addition to the City-paid UTO, Local 230 Executive Board members receive additional pay from Local 230. A Local 230 Board member can receive up to \$39,295 for service on the Local 230 Board."

City Response to Findings 1a and 1b

The City agrees with Finding 1a. IAFF, Local 230 representatives take City-paid union time off during work hours to handle union business. As a result, IAFF, Local 230 representatives are receiving full pay, but only perform their assigned duties when not handling union business.

The City has made attempts to ensure that City-paid union time off from an employee's normal job duties is being approved in appropriate circumstances. There are certain types of activities that are clearly important union work, but it may not be appropriate or legal to provide City-paid union time off to participate in these activities. An example is the restriction on the use of City funds to participate in political or campaign related activities. Ensuring that the City approves paid time off appropriately is important to avoid any issues regarding the use of City funds.

On January 9, 2008, the City Administration sent a letter to IAFF, Local 230 in an effort to ensure that City-paid union time off is approved in appropriate circumstances. (Please see Attachment B.) Following that letter, City-paid union time off was not approved in specific instances. One was a request to provide City-paid union time off for a union official to attend a

union convention in Burlingame, California. Two other requests were for a union official to be paid their regular City pay to participate in charity events. The issue for the City Administration was not whether the specific events were worthwhile, but whether the City should use City funds to pay a firefighter union official's salary while participating in these events. The denials of using City funds for participation in these events led to a grievance filed by IAFF, Local 230 that the union advanced to arbitration.

In the grievance arbitration in 2008, an arbitrator rescinded the January 9, 2008, letter (Attachment B) and required the City to reverse the denial of City-paid union time off to attend union conventions and to participate in charity events. The arbitrator interpreted the union contract to require the City to provide up to 3 firefighter union officials City-paid union time for up to 12 hours per shift. This equates to a maximum of 36 hours of City-paid union time off per day, 365 days a year, for a maximum of 13,140 work hours paid by the City. (Documents related to the 2008 grievance arbitration are available upon request.) In addition, union business can be any function or event as determined by the union. The arbitrator ruled that the City could not deny the use of City-paid union time off in advance of the time being taken away from normal duties. In addition, the arbitrator stated that the City could ask what the City-paid union time off was for, but only after the time off was taken. However, there exists no criteria by which the City-paid union time off could be retroactively rescinded. Further, the arbitration award established that the union determines what qualifies for City-paid union time off.

In response to Finding 1b, it is the City's understanding that IAFF, Local 230 representatives receive compensation from the Union for serving as a union official. Therefore, union officials receive regular pay from the City and compensation from the Union.

Grand Jury Recommendation 1

"Rather than the current UTO arrangement, the City should negotiate a revision to the MOA that designates no more than two individuals who will conduct union business on a permanent basis for a specific agreed upon term. These individuals should not have responsibilities as working firefighters during the term they are assigned to union business."

City Response to Recommendation 1

The City accepts this recommendation and agrees that there should be more specific contract language in the MOA. The City agrees that it should provide City-paid union time off to IAFF, Local 230 representatives for negotiations, labor management committees, representing employees in grievance or disciplinary matters and other similar functions.

An alternative to providing City-paid union time off for a specific number of individuals would be to negotiate contract language that specifies the types of meetings and events in which City-paid union time off is appropriate. The City is currently in negotiations with IAFF, Local 230 and has made a proposal related to City-paid union release time. (Please see Attachment C.)

Grand Jury Finding 2

"Under the MOA, UTO may be used for any purpose the Local 230 sees fit. The result is that the City is supporting Local 230 political activities and bargaining tactics by paying:

- Local 230 executives to be trained in tactics to win at the bargaining table.
- Local 230 representatives to attend events where they foster political support for Local 230 positions.
- At least in part, for the Local 230's Executive Vice President to run the Local 230's political action committee."

City Response to Finding 2

The City has made efforts to ensure that City-paid union time off is provided in appropriate circumstances to IAFF, Local 230 representatives.

There is no provision in the MOA that specifically grants IAFF, Local 230 City-paid union time off. IAFF, Local 230 has relied on the MOA provision of Article 33 ("Minimum Staffing") to require the City to grant up to 12 hours per shift of time off for up to 3 Union Executive Board members from normal duties. As mentioned above, this would include paying up to 3 members of the union's Executive Board their normal City salary during these absences for any reason that IAFF, Local 230 deems to be union business.

Article 33 of the MOA relates exclusively to minimum staffing levels. It does not state that the City is required to provide City-paid union time off to conduct union business. The City respects and supports City-paid union time off for union representatives. The City believes it is in the City's and IAFF, Local 230's mutual interest that it be approved in appropriate circumstances and to ensure accountability for the use of City funds. However, as mentioned under City's response to Findings 1a and 1b above, in 2008 an arbitrator ruled that the MOA provision in Article 33 requires the City to provide City-paid union time off to conduct union business, as determined by the union.

Grand Jury Recommendation 2

"The City should negotiate a revision to the MOA to shift the cost burden of the union activities noted in Finding 2 from taxpayers to Local 230."

City Response to Recommendation 2

The City accepts this recommendation. The City has made a proposal on City-paid union time off during the current negotiations. (Please see Attachment C.)

Grand Jury Finding 3a

"The appropriate use of UTO is not adequately defined in the Memorandum of Agreement. The last attempt by the City to correct the situation was thwarted in arbitration in 2008."

Grand Jury Finding 3b

"The top three Local 230 executives have taken more than 10,000 hours of UTO over five years (an average of 39.6 hours per week) during their on-duty work time with no accounting for their whereabouts."

City Response to Findings 3a and 3b

The City agrees with these findings. There is no provision in the MOA that specifically grants IAFF, Local 230 City-paid union time off. Attempts were made to clarify the use of City-paid union time off during the 2004 negotiations, which resulted in an interest arbitration in 2007 for a successor MOA. In that arbitration, the arbitrator awarded no revisions to the MOA. In 2008, as a result of a grievance arbitration, an arbitrator agreed with IAFF, Local 230's interpretation of the use of City-paid union time off.

The City is currently in negotiations with IAFF, Local 230 for a successor MOA and has provided a proposal on City-paid release time. (Please see Attachment C.) Those negotiations are currently pending.

In response to Finding 3b, the top three IAFF, Local 230 executives did take over 10,000 hours of City-paid union time off in the last five years.

Grand Jury Recommendation 3

"The City should negotiate a revision to the MOA specifying that UTO may only be used for the following purposes:

- To attend Civil Service Commission meetings when matters affecting the Union are considered.
- To attend City Council meetings when matters affecting the Union are considered.
- To attend Federated Retirement Board meetings.
- To attend grievance meetings when used to facilitate settling of grievances.
- To attend Benefit Review Forum meetings (up to two designated representatives).

- To attend City Labor Alliance meetings held with the City Manager or Employee Relations Director (up to two designated representatives).
- To attend meetings scheduled by Administration when attendance is requested.
- To attend other meetings and trainings approved by the Employee Relations Director or designee."

City Response to Recommendation 3

The City agrees with this recommendation. The City is currently in negotiations with IAFF, Local 230 and has proposed language on City-paid union time off that meets the intent of this recommendation. (Please see Attachment C.)

Grand Jury Finding 4a

"There is no oversight of UTO, which leaves it open to abuse. A Local 230 representative does not have to explain the reason for the absence beyond claiming it was UTO. Even the supervisor would not know their location on UTO during work hours or the specific purpose of their leave under the current UTO policy."

Grand Jury Finding 4b

"During UTO the City is liable for any injuries or property damage caused by the Local 230 representative or any injuries suffered by the Local 230 representative, yet the City has no control over what the Local 230 representative is doing or their location."

City Response to Findings 4a and 4b

The City agrees with these findings. As a result of the 2008 grievance arbitration award, an arbitrator has interpreted the union contract in a way that results in the union determining the use of City-paid union time off. This may include instances in which the firefighter union official is out of state and still receiving regular pay for up to 12 hours per day.

In response to Finding 4b, if the employee is receiving City-paid union time off, the City may be liable for any injuries suffered by the IAFF, Local 230 representative.

Grand Jury Recommendation 4

Until Recommendation 1 is accomplished, at a minimum the City should negotiate with the Union to revise UTO terms in the MOA to the following:

- A description of what constitutes union business payable by the City

- A requirement that UTO be approved by the immediate supervisor in advance, with information as to what the union activity is, the length of the absence, and the fire fighter's location
- Reporting and data tracking of UTO activity, including information regarding notification, purpose, and time taken
- A limit on the total number of days per year allowed for UTO
- A limit on the total number of UTO absentees allowed per Battalion
- An emergency callback requirement

City Response to Recommendation 4

The City accepts this recommendation and has made a proposal to IAFF, Local 230 on City-paid union time off. (Please see Attachment C.)

Grand Jury Finding 5a

"As long as no more than three Local 230 representatives are out on UTO at any one time, under the current MOA, a Local 230 representative may take UTO during work hours up to 12 hours during a shift."

Grand Jury Finding 5b

"When a firefighter is on UTO or training, the assigned station runs one person short. Often the firefighter on UTO is a higher ranking officer and is therefore not present to direct the fire fighting team during an emergency call. A less experienced firefighter would be required to step up."

Grand Jury Finding 5c

"If a firefighter is absent due to UTO or training, his position is not back filled. Article 33, Section 33.2.6 of the MOA allows for minimum staffing per company to drop by one fire fighter for these purposes. If the minimum staffing level per company is truly minimal, the public safety could be jeopardized. Alternatively, if this level of risk is low, it would appear that the minimum staffing level per company could be reduced or backfill could be required."

City Response to Findings 5a, 5b and 5c.

The City agrees with these findings. As a result of the 2008 grievance arbitration award, an arbitrator has interpreted the union contract in a way that results in the union determining the use of City-paid union time off. This may include instances in which the firefighter union official is out of state and still receiving regular pay for up to 12 hours per day. During this time, the

station where each IAFF, Local 230 representative is assigned to, will run short unless the Fire Chief fills the absence with another employee, which may result in an overtime expense.

Grand Jury Recommendation 5

"The San Jose City Manager should investigate and document whether Section 33.2.6 of the MOA presents a safety or staffing problem. If issues are found, minimum staffing requirements should be re-evaluated. Any changes to minimum staffing requirements should be addressed in a future MOA."

City Response to Recommendation 5

The City accepts this recommendation and Minimum Staffing is a subject in the current negotiations with IAFF, Local 230.

Grand Jury Finding 6

"San Jose firefighters may accumulate sick leave and cash out at their highest salary rate upon retirement. Recently, a retired Deputy Fire Chief received a check in the sum of \$251,870.11 for his accumulated sick leave."

City Response to Finding 6

The City agrees with this finding. Currently, employees represented by IAFF, Local 230 accrue sick leave every payperiod. These balances continue to accumulate and there is no maximum number of sick leave hours that may be accrued. Under the current MOA, when an eligible employee retires (20 years of service), the employee will receive a cash payment for any unused accrued sick leave hours. Payment for service retirements is determined by the number of unused accrued sick leave hours, as described in the tables below.

40 Hour Employees	
Accrued Hours	Payout Formula – Service Retirements
0 – 399	Accrued Hours x 50% of Hourly Rate
400 – 799	Accrued Hours x 60% of Hourly Rate
800 – 1200	Accrued Hours x 80% of Hourly Rate
1201+	Accrued Hours x 100% of Hourly Rate

56 Hour Employees	
Accrued Hours	Payout Formula – Service Retirements
0 – 559	Accrued Hours x 50% of Hourly Rate
560 – 1119	Accrued Hours x 60% of Hourly Rate
1120 - 1679	Accrued Hours x 80% of Hourly Rate
1680+	Accrued Hours x 100% of Hourly Rate

For service retirements, payment is made at 100% for accrued sick leave hours above 1201 hours for 40 hour employees and above 1680 hours for 24 hour employees. This results in very significant sick leave payouts.

The City is currently in negotiations with IAFF, Local 230 and the City has made proposals on sick leave payouts for current employees and new hires. (Please see Attachment D.)

Grand Jury Recommendation 6

"The City should negotiate with the Local 230 to revise the MOA to add a reasonable cap on sick leave accrual. Firefighters should not be encouraged to come to work ill by the incentive of a large payout upon retirement."

City Response to Recommendation 6

An alternative to a cap on sick leave accrual is to modify the sick leave payout provision in the MOA. The City is currently in negotiations with IAFF, Local 230 and has made proposals on sick leave payouts for current employees and new hires. (Please see Attachment D.)

Grand Jury Finding 7a

"The desire of Local 230 Executives to be in control of operational decisions causes delay while disputes are being resolved through the grievance process."

Grand Jury Finding 7b

"The number of open grievances, lawsuits and arbitrations filed by Local 230 far exceeds the number filed by all other unions in the City combined."

City Response to Finding 7a and 7b

The City agrees with these findings. IAFF, Local 230 historically files significantly more grievances, meet and confer demands and lawsuits than other bargaining units in the City. The number of grievances, demands to meet and confer, and lawsuits filed by IAFF, Local 230, particularly on operational matters, cause delays and makes it difficult for the Fire Department to make operational changes.

Grand Jury Recommendation 7

"The City should revisit the MOA to determine if more specific language in applicable sections would assist in reducing unnecessary labor relations issues."

City Response to Recommendation 7

The City accepts this recommendation and will continue to explore contract sections that could be revised to reduce the number of labor relations issues.

Grand Jury Finding 8a

"Local 230 has refused to participate in an international labor relations workshop sponsored by Labor Management Initiative (LMI)."

Grand Jury Finding 8b

"Local 230 executives have refused to participate in the quarterly labor relations meetings and have refused to allow the labor relations officer to facilitate and resolve concerns to mutual satisfaction as required by the MOA."

Grand Jury Finding 8c

"There appears to be a pervasive lack of trust between Local 230 executives and City management."

City Response to Findings 8a, 8b and 8c

The City agrees with these findings. The Administration has formally requested that the union participate in an international labor relations workshop, however, IAFF, Local 230 has not agreed to participate in this workshop.

The MOA provides that a Labor Management Committee, consisting of three representatives of the Fire Department, three members of the Union and Employee Relations Officer shall meet no less than quarterly to discuss Fire Department matters, however, the meetings have occurred very infrequently.

Grand Jury Recommendation 8

"Local 230 representatives and City management should participate in the LMI and quarterly Labor Management Committee meetings designed to foster cooperative and collaborative labor-management relationships."

City Response to Recommendation 8

The City accepts this recommendation and has requested IAFF, Local 230's participation in the LMI. The City will continue to seek participation from IAFF, Local 230 to participate in the quarterly Labor Management Committee.

Grand Jury Finding 9a

"Local 230 has refused to discuss ground rules for negotiation as requested by the City of San Jose."

Grand Jury Finding 9b

"Negotiation for the current MOA, covering 2004-2009, started in January 2003 and was not completed until December 2008. This resulted in the City and Local 230 operating without a signed agreement for approximately five years."

September 3, 2009

Subject: Response to the Civil Grand Jury Report Entitled "City of San Jose Hosed by IAFF Local 230 Executives"

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City Response to Findings 9a and 9b

The City agrees with Finding 9a. Historically, no agreement has been reached with IAFF, Local 230 on ground rules for the negotiation process. For example, in the pending negotiations, the City and IAFF, Local 230 have discussed ground rules, but no agreement was reached.

In response to Finding 9b, the negotiations for the MOA that expired in February 2004 commenced in January 2003 and was not completed until August 2007 when the arbitration award was issued.

Grand Jury Recommendation 9

"In order to facilitate the negotiation process, Local 230 and the City Manager should agree upon appropriate ground rules. (See Appendix E for sample ground rules.)

City Response to Recommendation 9

The City accepts this recommendation and has proposed ground rules to IAFF, Local 230 during the current negotiations. However, no agreement was reached on ground rules. (Please see Attachment E.)

PUBLIC OUTREACH/INTEREST

By the very nature of the Grand Jury's report and its release, public outreach requirements have been met. Additionally, upon approval of this memorandum by Council, the City Attorney will submit the memorandum to the presiding judge of the Superior Court, as required under Penal Code Section 933(c).

COORDINATION

This memorandum was coordinated with the City Attorney's Office.

CEQA

Not a project.



Debra Figone
City Manager

*For additional information on this report, contact Alex Gurza,
Director of Employee Relations, at 535-8150.*

- Attachment A: Santa Clara County Civil Grand Jury's report, "City of San Jose Hosed By IAFF Local 230 Executives."
- Attachment B: Letter to IAFF, Local 230 dated January 9, 2008
- Attachment C: City's proposal on City-paid union time off
- Attachment D: City's proposals on Sick Leave Payouts for current employees and new hires
- Attachment E: City's proposed Ground rules