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September 5, 2013

Mr. B. Craig Deats
Deats Durst Owens & Levy
1204 San Antonio Street, Suite 203
Austin, Texas 78701

Re: Local 975 Grievance Dated May 17, 2013

Dear Craig:

The purpose of this letter is to provide you and Local 975 with additional information about the reasons the City has denied the grievance submitted by Local 975 on May 17, 2013. The grievance requests indemnification and payment of defense costs arising from the discrimination charge that Local 975 received from the EEOC on about April 15.

While Chief Kerr's written response dated May 22 was sufficient for purposes of the collective bargaining agreement, it has come to our attention that Local 975 may not understand in detail why the City cannot jointly defend and indemnify Local 975 in this case. We believe it would be beneficial to a fuller discussion and any possible resolution of the issues to set out the City's position on this grievance in more detail.[1]

1. The City and Local 975 Have Conflicting Positions on the Results of the 2012 Hiring Process

Fundamentally, we believe the City and Local 975 have an irreconcilable conflict concerning the results of the 2012 hiring process. Simply put, the City has serious concerns that the hiring list generated by the 2012 process is not lawful under Title VII, and that use of that list has and will continue to expose the City to significant liability.

As you know, in November 2012 the City received a charge of employment discrimination from EEOC filed by an unsuccessful African-American applicant in the 2012 hiring process. The charge alleges that the 2012 hiring process had a disparate impact on

1 This letter does not limit the issues the City may raise, or arguments it may make, during any arbitration of the grievance. The City reserves fully its right to raise other matters beyond this letter at any arbitration hearing.

African-Americans. The charge does not claim that the City intended to discriminate against African-Americans, but rather this was the unintended result of a facially-neutral hiring process.

The City has defended the discrimination charge vigorously before the EEOC. At the same time, the statistical results of the 2012 hiring process are both undeniable and disturbing. For example, of 328 African-Americans who were tested in that process, only one made the Top 100 list and only three were in the Top 150. Similarly, the selection rate for Hispanics who were tested was 3.7%, as compared to 8.3% for Whites. Without going into unnecessary detail, the statistical results of the 2012 test process showed significant adverse impact against both African-Americans and Hispanics.

In the course of defending the 2012 hiring process before the EEOC, we identified two fundamental problems with the process that have severely undercut the City's ability to defend the results of that process. First, through an inadvertent administrative error the candidates were given only two hours to complete the NFSI test, even though the test was designed to be taken in a 2½ hour period. We are advised that a time difference on that order of magnitude would likely increase the adverse impact of a written test beyond what would otherwise be expected. In addition, we are also advised that such an error would affect the validity of the test itself as a valid predictor of success as a firefighter.

The second problem with the 2012 hiring process is the design of the process itself. The agreed hiring process called for the NFSI score to be used as a selection hurdle three separate times: (1) as a cut score (minimum score 70); (2) as a rank-ordered selection device (Top 1500); and (3) in combination with the structured oral interview for a rank-ordered composite score. Thus, the process design placed a heavy emphasis on the NFSI written test score – a type of test that historically tends to have adverse impact against African-Americans and Hispanics.

The bottom line is that: (1) the result of the selection process appears to have a significant adverse impact on African-American and Hispanic candidates; and (2) the design and administration factors described above make it unlikely that the hiring process is defensible. As a result, the City no longer considers the hiring list created by that process to be legally defensible under Title VII, even though we steadfastly assert that the intent of the process was to comply with Title VII and with the goals stated in the bargaining agreement.[2] If Local 975 agrees with the City on these fundamental points, then we may not have

2 We stress that the City's concern about the validity of the 2012 hiring process result does not in any way reflect on the candidates who were selected in that process. All of them were highly qualified candidates, and their spots in the cadet academies were well-earned and deserved. Our point is simply that other candidates were likewise well-qualified to be Austin firefighters, but may not have gotten an equal chance to be selected in that process.

conflicting positions on the validity of the 2012 hiring process. However, my understanding is that Local 975 does not agree with our position on these points.

Since the parties are in conflict on these fundamental issues, a joint defense is neither required nor appropriate in this case. The language in Article17, Section 5(B) clearly contemplates a situation where the City and Local 975 have the same position, not a situation where (as here) the parties have fundamentally different and opposing positions.

2. The EEOC Charge Against Local 975 Doesn't Trigger the Contractual Requirements of Article 17, Section 5(B)(3)

As a threshold matter Local 975's grievance isn't proper because the requirements of Section 5(B)(3) have not been met.

First, we note that no applicant in the 2012 hiring process has filed an "action . . . against the City and the Association on account of the operation of . . ." Section 5(B)(3) – which is a condition precedent to the application of that paragraph. Rather, your grievance relates to an EEOC charge filed solely against Local 975 on April 15, 2013. The City is not a party to that EEOC proceeding, and has not been asked by EEOC to participate in the investigation or other proceedings related to the charge against Local 975.[3]

Second, even if the EEOC charge against Local 975 did require the City to take action under paragraph 5(B)(3), our obligation is to defend "the validity of this provision," not to defend Local 975.[4] The City has consistently defended the 2012 process as set out in Article 17 – even though we do not believe the result in this instance was a defensible hiring list. Thus, the City has already fulfilled any requirements Section 5(B)(3) might impose even if it did apply here (which it does not).

Third, item (2) of the remedy requested in the grievance is not ripe for consideration. That item asks the City to pay its defense costs incurred in defending "claims brought by DOJ or any individual as a result of the negotiated hiring procedure . . . ." The DOJ has made no claim against Local 975 to our knowledge, so we do not see any basis for that request. With regard to the claim by an "individual," we decline that request because there is nothing in Section 5(B)(3) that obligates the City to take action unless there is an action filed "against the City and the Association," which (once again) has not occurred.

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3 While that same individual also filed an entirely separate charge with EEOC against the City last November, Local 975 is not a party to that charge and the City has not asked for any assistance or support from Local 975 on that matter. Further, Local 975 has not incurred any liability or defense costs in connection with the charge filed against the City.

4 The charge filed against Local 975 is directed to Local 975's motives concerning the validity language in Article 17. That is Local 975's issue, and the City is not required to defend the motives of Local 975.

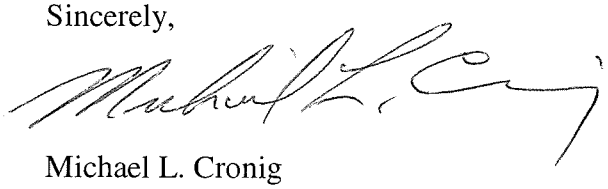
3. The City is Precluded by Operation of Law From Indemnifying Local 975

The City declines item (3) of the requested remedy in the grievance for the additional reason that the City is barred by operation of state law from providing indemnification. Simply put, the Texas Constitution bars municipalities from undertaking indemnification. And beyond the Constitutional prohibition, the language in Article 17, Section 5.B(1) of the bargaining agreement is conditional in any event, i.e. "To the extent allowed by law, the City shall indemnify . . . ." Thus, because the agreement limits any indemnification duty to those circumstances allowed by law, and because the City cannot lawfully undertake to indemnify Local 975, the City must deny this part of Local 975's requested relief for this additional reason.

Moreover, if either the EEOC or the individual who filed the discrimination charge against Local 975 did succeed in proving a case against Local 975, the most likely result would be some type of injunctive relief against Local 975 – not monetary damages. Even if an indemnity claim against the City was proper, indemnity would not be available for injunctive relief.

For all these reasons, the City must deny the grievance and the requested relief. At the same time, we are certainly willing to cooperate in any reasonable way with Local 975 in its defense of the EEOC charge filed against it. While the City will not provide its written communications with EEOC to Local 975, we will provide you with any other non-privileged information in the City's possession that Local 975 may need to support whatever position it has taken with EEOC on the charge filed against it. We believe under the particular circumstances of this dispute that this is all the City is required to do and can do. Please let me know if Local 975 is requesting any such assistance.

Sincerely,



Michael L. Cronig
Assistant City Attorney