



MEMORANDUM

TO: CITY COUNCIL

FROM: DEBBIE MALICOAT, DIRECTOR OF ADMINISTRATIVE SERVICES

SUBJECT: CONSIDERATION OF A RESOLUTION AND EMPLOYMENT AGREEMENT APPOINTING ROBERT K. MCFALL TO THE POSITION OF INTERIM CITY MANAGER

DATE: AUGUST 23, 2016

RECOMMENDATION:

It is recommended the City Council adopt a Resolution appointing Robert K McFall to the position of Interim City Manager and authorize the Mayor to execute the employment agreement.

IMPACT ON FINANCIAL AND PERSONNEL RESOURCES:

The employment agreement specifies an hourly rate of \$86.06. Total costs will depend on the length of service of the Interim City Manager; however it will not exceed 960 hours over eight months, for a total cost of approximately \$82,617.60. The City Manager program staffing budget has a balance of approximately \$148,500 for FY 2016-17.

BACKGROUND:

The City is currently recruiting for the position of City Manager and is in need of an Interim City Manager to fill this role during the recruitment, which is expected to take approximately eight months. On August 9, 2016 the City Council authorized an agreement with Regional Government Services (RGS), which is a governmental joint powers authority that assists other government agencies with short-term staffing needs, to facilitate the hiring of Mr. McFall as Interim City Manager. That agreement specified an hourly billing rate of \$125 plus a monthly housing allowance of \$1,700. Subsequent to the Council's action, Mr. McFall decided not to enter into an employment agreement with RGS due to complexities associated with hiring a California Public Employees' Retirement System ("CalPERS") retiree. As such, the agreement with RGS was not executed by the City and it is recommended that the City not move forward with that agreement.

ANALYSIS OF ISSUES:

Employment of a person that is retired from CalPERS, a retired annuitant, is subject to certain criteria and regulations specified in the Government Code. These rules are intended to protect the public's interest by enabling CalPERS contracting agencies the ability to re-employ retirees, and protect the retirement system from inappropriate use or

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abuse. CalPERS recognizes that retirees can play an important role in keeping city business running, particularly in short term or emergency situations, but also provides limitations on their service. The Government Code provides specific guidance on employing a CalPERS retiree without reinstatement from retirement or loss or interruption of retirement benefits. Specifically, Government Code Section 21221(h) applies in the City's circumstances, where the City is seeking to fill a vacant position during the recruitment for a permanent appointment and the position requires specialized skills. Key terms of hiring the retired annuitant under this Code Section are:

1. **Limited duration work & retiree skills:** The appointment needs to be clearly of limited duration and the vacant position must require specialized skills, which are possessed by the retiree.
2. **960 hour limit:** Retirees can work a maximum of 960 hours each fiscal year, regardless of the number of CalPERS contracting employers they work for.
3. **Rate of Pay requirement:** The compensation paid to any retiree must be within the monthly rate of pay range (not more or less than the City Manager pay range) and no other benefit, incentive, compensation in lieu of benefits, or other form of compensation can be paid in addition to this hourly pay rate.
4. **Open recruitment:** The interim appointment must be for a vacancy during recruitment of a permanent appointment.
5. **Enrollment in the my|CalPERS system:** The City must report the pay rate and hours worked to CalPERS through the system currently used to report payroll.

The Government Code Section applies to hiring CalPERS retired annuitants, but does not apply to independent contractors. The agreement with RGS specified that RGS would provide an independent contractor to the City, which RGS believes is the appropriate and legally defensible contractual relationship. The agreement with RGS did contain a provision indemnifying the City should CalPERS determine that Mr. McFall was not acting as an independent contractor. Mr. McFall's agreement with RGS, however, did not include that same protection. Consequently, Mr. McFall chose not to be employed by RGS, therefore it is recommended that the City secure Mr. McFall's services directly as a retired annuitant, rather than through a third party employment agency.

The accompanying Resolution and Employment Agreement identify the detailed terms of the Interim City Manager engagement. Employing Mr. McFall in this manner will help ensure that CalPERS regulations related to retirees are followed and will result in a lower cost to the City. The RGS contract called for an hourly billing rate of \$125 plus a monthly housing allowance of \$1,700. Assuming 960 hours of work, the total cost over eight months would be approximately \$133,600. Directly hiring Mr. McFall will cost \$86.06 per hour with no additional housing allowance, for a total of \$82,617.60, thus saving the City approximately \$51,000.

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Mr. McFall is very familiar with the City of Arroyo Grande, having previously assisted the City with several departmental assessments, executive goal setting and team building, facilitation of interdepartmental issues, and as the Interim City Manager in 2015. His rapport with the department head team and other city employees will enable him to quickly come up to speed on issues and concerns and be an effective leader for the City. He is exceptionally well qualified to fill the Interim City Manager position for the City of Arroyo Grande.

ALTERNATIVES:

The following alternatives are provided for the Council's consideration:

- Adopt the Resolution and Employment Agreement
- Modify the Resolution and Employment Agreement
- Do not adopt the Resolution and Employment Agreement; or
- Provide direction to staff regarding City Council alternatives.

ADVANTAGES:

Hiring an Interim City Manager will provide the leadership and management for the City to continue accomplishing required duties while recruiting for a permanent City Manager. Mr. McFall's familiarity and rapport with City staff will enable him to step into this role quickly and continue moving the City forward during this time.

DISADVANTAGES:

The only disadvantage is the cost; however it is anticipated to be lower than previously estimated and is within the approved budget for the City Manager position.

ENVIRONMENTAL REVIEW:

No environmental review is required for this item.

PUBLIC NOTIFICATION AND COMMENTS:

The Agenda was posted in accordance with Government Code Section 54954.2.

RESOLUTION NO.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ARROYO GRANDE APPOINTING ROBERT K. MCFALL TO THE POSITION OF INTERIM CITY MANAGER AND AUTHORIZING THE MAYOR TO EXECUTE THE EMPLOYMENT AGREEMENT

WHEREAS, the city manager position within the City of Arroyo Grande (“City”) is vacant and the City is recruiting for a permanent city manager; and

WHEREAS, the position of city manager requires specialized skills; and

WHEREAS, the City of Arroyo Grande desires to appoint Robert K. McFall as an interim appointment retired annuitant to the position of Interim City Manager under Government Code sections 7522.56 and 21221(h), effective August 24, 2016; and

WHEREAS, Government Code section 21221(h) allows a retired person to serve in an interim appointment to a vacant position during recruitment for a permanent appointment that requires specialized skills; and

WHEREAS, Robert K. McFall has demonstrated through his experience and work history that he possesses the required specialized skills; and

WHEREAS, this section 21221(h) appointment shall only be made once to this vacant position, and therefore will end no later than May 31, 2017; and

WHEREAS, the entire employment agreement between Robert K. McFall and the City of Arroyo Grande has been reviewed by this body and is attached herein as Exhibit “A” (“Employment Agreement”); and

WHEREAS, this appointment, including all matters, issues, terms or conditions related to this employment and appointment shall be limited to 960 hours per fiscal year; and

WHEREAS, pursuant to Government Code section 21221(h), the compensation paid to retirees cannot be less than the minimum nor exceed the maximum monthly base salary paid to other employees performing comparable duties as listed on the pay schedule for the vacant city manager position, divided by 173.333 to equal the hourly rate; and

WHEREAS, the monthly base salary rate paid to Robert K. McFall will be \$14,917.00 and the hourly equivalent is \$86.06; and

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WHEREAS, Robert K. McFall has not and will not receive any other benefit, incentive, compensation in lieu of benefit, or any other form of compensation in addition to this pay rate.

NOW, THEREFORE BE IT RESOLVED by the City Council of the City of Arroyo Grande as follows:

1. That the above recitals are true and correct and incorporated herein.
2. The City Council does hereby appoint Robert K. McFall to the position of Interim City Manager and hereby certifies the nature of the appointment of Robert K. McFall as described herein and detailed in the attached Employment Agreement, and that this appointment is necessary to fill the critically needed position of Interim City Manager for the City of Arroyo Grande, until the recruitment process is completed.
3. That the Mayor is authorized, on behalf of the City Council, to execute the Employment Agreement, a copy of which is attached as Exhibit A, setting forth the terms and conditions of employment for Robert K. McFall.

On motion of Council Member _____, seconded by Council Member _____, and on the following roll call vote, to wit:

AYES:

NOES:

ABSENT:

the foregoing Resolution was passed and adopted this 23rd day of August, 2016.

JIM HILL, MAYOR

ATTEST:

KELLY WETMORE, CITY CLERK

APPROVED AS TO CONTENT:

GEOFF ENGLISH, ACTING CITY MANAGER

APPROVED AS TO FORM:

HEATHER K. WHITHAM, CITY ATTORNEY

CITY OF ARROYO GRANDE EMPLOYMENT AGREEMENT

THIS AGREEMENT, (hereinafter referred to as the “Agreement”) is made and entered into this 23rd day of August 2016, by and between the City of Arroyo Grande, a municipal corporation of the State of California (hereinafter referred to as the “City”) and Robert K. McFall (hereinafter referred to as “McFall”).

SECTION 1 EMPLOYMENT

- A. The City agrees to and shall employ McFall as Interim City Manager of the City of Arroyo Grande. McFall agrees to perform the functions and duties of the position of Interim City Manager of the City of Arroyo Grande as described by state law, the Municipal Code of the City of Arroyo Grande, the job description of the position of City Manager, and all other duties and functions as the City Council of the City shall from time to time assign, including participating in the recruitment of the permanent City Manager.
- B. This interim position is created solely for a CalPERS retired annuitant to fill the vacant position of City Manager during the recruitment to permanently fill the vacancy, and complies with the provisions of the Post-Retirement Public Employment under CalPERS and PEPPRA Legislation, Government Code § 7522.56 and Government Code § 21221(h).
- C. McFall, by virtue of having previously been employed as Assistant City Manager for the City of Glendale and having 33 years of experience as a municipal administrator, is uniquely qualified and has the requisite specialized skills, training and experience to serve as Interim City Manager for the City.
- D. McFall agrees to perform all such functions and duties to the best of his abilities and in a competent and efficient manner.
- E. McFall represents that he is a retired annuitant of the California Public Employees' Retirement System (“CalPERS”) within the meaning of Government Code § 21221(h) as of the effective date of this Agreement. McFall acknowledges that he is restricted to working no more than a combined 960 hours for the City, a state agency, or other CalPERS contracting agencies (collectively “CalPERS Agencies”) during any fiscal year, and that his compensation is statutorily limited as provided in Government Code § 21221(h). McFall represents that he has not received any unemployment compensation from any CalPERS Agencies during the 12-month period preceding the effective date of this Agreement, that he has not received a retirement incentive upon retirement within the meaning of Government Code § 7522.56(g), and that he has attained normal retirement age within the meaning of Government Code § 21220.5.

- F. McFall will work an average of approximately thirty-two hours per week, more or less, depending on City Council direction, not to exceed 960 hours.
- G. City shall defend and indemnify McFall in accordance with Government Code Sections 995 and 825 for any claims or actions arising out of McFall's acts or omissions occurring within the scope of his employment as Interim City Manager. This provision shall survive termination of this Agreement.

SECTION 2 TERM

- A. McFall shall serve at the will and pleasure of the City Council. Nothing in this Agreement shall prevent, limit or otherwise interfere with the right of the City Council to terminate the employment of McFall at any time and for any reason, or for no reason.
- B. This Agreement shall become effective on August 24, 2016, and unless otherwise terminated, shall remain in effect until May 31, 2017 and will not exceed 960 hours in any fiscal year.
- C. Nothing in the Section shall or is intended to prevent, limit or otherwise interfere with the right of the City or McFall to terminate the employment of McFall prior to the expiration of this Agreement or any extension thereof.

SECTION 3 TERMINATION

- A. The City Council and McFall may agree mutually in writing to terminate McFall's employment.
- B. The City may terminate McFall's employment at any time with or without cause by providing two weeks' notice. Upon termination, McFall shall only be entitled to the salary then due and owing him through the last day actually worked. McFall shall not be entitled to any severance under the Agreement.
- C. McFall may terminate his employment at any time for any reason by providing two weeks' written notice to the City. In the event that McFall provides such written notice, he shall be entitled to receive at the termination of this employment only unpaid base wages as may be due and payable under applicable City rule, regulation or policy, and/or under applicable local, state or federal law. McFall shall not be entitled to any severance pay or other compensation at the termination of his employment. During the period subsequent to McFall's submission of his notice terminating his employment, he shall continue to perform his duties as Interim City Manager pursuant to this

Agreement unless removed from those duties and/or terminated by the City Council pursuant to the terms of this Agreement.

- D. As required by Government Code § 53260, if the Agreement is terminated, the maximum cash settlement that McFall may receive shall be an amount equal to the monthly salary of McFall multiplied by the number of months left on the unexpired term of this Agreement. As stated above, McFall shall not be entitled to any cash settlement, severance pay or other compensation upon termination of this Agreement.

SECTION 4 SALARY AND COMPENSATION

- A. Effective upon the commencement of this Agreement, the City shall pay to McFall a base salary of \$14,917.00 per month or \$86.06 per hour. Pursuant to Government Code § 7522.56, the pay rate is not less than the minimum nor exceeds the maximum monthly base salary paid to other employees performing comparable duties. This salary shall be paid on a pro rated basis in regular installments pursuant to the City's normal payroll procedures.
- B. The City shall deduct or withhold from McFall's salary any and all sums as McFall may from time to time direct, or as required by law, including but not limited to, sums for the payment of federal, state and/or local income taxes, Social Security and Medicare tax withholding.
- C. McFall shall not receive any benefit, incentive, compensation in lieu of benefits, or other form of compensation in addition to the monthly pay rate.
- D. McFall will comply with all applicable CalPERS rules and regulations governing employment after retirement, including the recordation and reporting of all hours worked for the City to CalPERS as may be required. The City shall assist in any such reporting obligation to CalPERS. Additionally, McFall shall keep City continually informed of any hours worked by McFall for other CalPERS agencies during the term of this Agreement.
- E. The City Council shall fix any other terms and conditions of employment relating to McFall's performance as the City Council may from time to time determine, provided that such other terms and conditions of employment are not contrary to or inconsistent with the terms set forth in this Agreement, the City's rules, regulations and ordinances, local, state and/or federal law.

SECTION 5 COMPLIANCE WITH AB 1344

- A. Notwithstanding any other provision of this Agreement, the parties agree to fully comply with the Government Code sections that are part of AB 1344, as it was

effective on January 1, 2012, ("AB 1344") to the extent that they are applicable to this Agreement and to fully comply with other applicable law as it exists as of the date of execution of this Agreement. In that regard, to the extent that they are applicable to this Agreement, the following Government Code sections are hereby incorporated into the terms of this Agreement:

Section 53243.1. Reimbursement of legal criminal defense upon conviction of crime involving office or position.

Section 53243.2. Reimbursement of cash settlement upon conviction of crime involving office or position.

Section 53243.3. Reimbursement of non-contractual payments upon conviction or crime involving office or position.

Section 53243.3. Abuse of office or position defined.

B. In addition, AB 1344 also includes Government Code Section 3511.2. Notwithstanding any other provisions of this Agreement, the City is prohibited through this Agreement or any amendment thereto or in any other way to provide an automatic renewal of this Agreement that provides for an automatic compensation increase in excess of a cost-of-living adjustment or a maximum cash settlement in excess of certain limits established by Section 3511.2.

SECTION 6 NOTICE

Any notices to be given hereunder by either party to the other in writing may be effected either by personal delivery or U.S. mail. Mailed notices shall be addressed to the parties as set forth below, but each party may change its/his address by written notice given in accordance with this Section. Notices delivered personally will be deemed communicated as of actual receipt. Mailed notices will be deemed communicated and received as of three calendar days following the date of mailing.

CITY: City of Arroyo Grande
Attention: Mayor
300 E. Branch Street
Arroyo Grande, CA 93420

Robert K. McFall: _____

SECTION 7 GENERAL PROVISIONS

- A. This Agreement constitutes the sole understanding and agreement of the City and McFall with respect to the matters set forth herein and supersedes any and all prior negotiations, statements, instructions, representations or agreement, whether written or oral.
- B. The parties agree and acknowledge that no representations, inducements, promises or agreements, oral or otherwise, have been made by any party, or by anyone acting on behalf of any party, which are not contained herein and that any agreement, statement or promise not contained in this Agreement shall not be valid or binding on either party.
- C. Any amendment to this Agreement shall be valid only if in writing approved and signed by both parties, unless otherwise specified in this Agreement.
- D. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions shall nevertheless continue in full force and effect.
- E. If any action at law or in equity is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees and costs in addition to any other relief to which that party may be entitled.
- F. This Agreement shall be governed by and construed in accordance with the laws of the State of California. Any action to interpret or enforce the terms of this Agreement shall be held exclusively in a state court in San Luis Obispo County, California.
- G. The failure of either party to insist upon strict compliance with any of the terms, covenants, or conditions of this Agreement by the other party shall not be deemed a waiver of that term, covenant, or condition, nor shall any waiver or relinquishment of any right or power at any one time or times be deemed a waiver or relinquishment of that right or power for all or any other times.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the date and year first written above.

City:

McFall:

Jim Hill
Mayor

Robert K. McFall

ATTEST:

Kelly Wetmore,
City Clerk

APPROVED AS TO CONTENT:

Geoff English,
Acting City Manager

APPROVED AS TO FORM:

Heather K. Whitham,
City Attorney