

WHAT WAS THE DEAL BETWEEN THE CITY OF ATASCADERO AND THE FORMER CHIEF OF POLICE?

AN INVESTIGATION INTO THE RESIGNATION/TERMINATION SETTLEMENT AGREEMENT

INTRODUCTION

On January 8, 2011, two San Luis Obispo County news outlets ran stories based on an announcement from the City of Atascadero (the City) that its Chief of Police (Chief) had resigned the previous day in order to spend more time with his family. One story also quoted the new Acting Chief of Police who stated, "It was a personal decision and we respect it."

On January 19, 2011 and January 20, 2011 respectively, these same two news outlets ran stories based on an announcement from the City that the former Chief had entered into a settlement agreement with the City, which stated that the parties "wish to mutually terminate" his employment. The City concurrently released a copy of the Settlement Agreement. This was done in response to a public records request for the Settlement Agreement.

Representatives of the City declined to comment further on the Settlement Agreement in response to inquiries from the news outlets. Also, the former Chief provided no further elaboration and insisted that he had resigned. These stories left the news outlets and citizens wondering publicly whether he had resigned or was terminated. What exactly happened that resulted in the former Chief leaving his position with the City?

ORIGIN

This investigation originated from a citizen complaint. The complaint noted a discrepancy between resignation and the mutual agreement to terminate employment statements given by the former Chief and the City. It also asserted a broader concern about the City's fiduciary responsibility to taxpayers in making a settlement payment to the former Chief. During the course of its investigation, the Grand Jury received information suggesting there was an unwarranted pattern of settlement payments by the same City Manager to other police personnel going back to 2004. The Grand Jury received two similar additional complaints, one anonymous and one signed. The Grand Jury decided to focus its investigation on the current controversy with respect to the discrepant statements and the process of their release to the public, in order to produce a timely report. It deferred a possible investigation into the broader question of the City's fiduciary responsibility in this case or historically to a future Grand Jury.

AUTHORITY

The Grand Jury's authority stems from California Penal Code Sections 925(a). Section 925(a) states in relevant part "...the grand jury may investigate and report upon the operations, accounts and records of the officers, departments, functions, and the method or system of performing the duties of any such city [an incorporated city located in the county] or joint powers agency and make such recommendations as it may deem proper and fit."

METHOD

In conducting the investigation that resulted in this report, the Grand Jury did the following:

- Interviewed the complainant.
- Interviewed representatives of City staff and the City Council.
- Reviewed relevant news stories and blogs related to those stories
- Reviewed agendas, minutes, and video recordings of City Council meetings.
- Reviewed photocopied original documents supplied by City Staff, particularly the Employment Agreement, the Settlement Agreement and the personnel file of the former Chief.¹
- Reviewed statutes applicable to the conduct of City Council meetings and the permitted disclosure of proceedings at closed sessions of the City Council.
- Consulted with County Counsel concerning the rights and obligations of the Grand Jury in conducting and reporting on this investigation.

NARRATIVE

In responding to the Grand Jury investigation involving the resignation and/or mutual agreement to terminate the employment of the former Chief of Police, the City of Atascadero staff readily provided the Grand Jury with the former Chief's Employment Agreement and the Settlement Agreement. It should be noted that both of these are also public documents. To gain a better understanding of the Employment Agreement, it is discussed at some length below.

¹ California Penal Code Section 832.7 (a), paraphrased, protects the confidentiality of personnel records of peace officers maintained by any local agency, but this section does not apply to investigations or proceedings concerning the conduct of peace officers or an agency or department that employs those officers conducted by a grand jury.

The Employment Agreement

The Chief was hired, effective December 29, 2007.² Section 2A of the Employment Agreement states that the Chief shall serve at the will and pleasure of the City Manager and that the City Manager may terminate the Chief as further provided in the Employment Agreement at any time for any reason or no reason at all.

Section 3 of the Employment Agreement deals with the legal rights and remedies available to both the Chief and the City with respect to the processes for ending his employment. Section 3 of the Employment Agreement describes five different methods of termination with the various rights and remedies specified for each termination method. These are paraphrased below:

1. The first method (Section 3A of the Employment Agreement) permits the City Manager and the Chief to mutually agree in writing to terminate the employment of the Chief. There is no specification as to the conditions and terms of a mutual termination agreement or the amount of any severance or settlement payment.
2. The second allows the City to terminate the Chief at any time without cause. It allows for severance compensation equal to six months of salary and benefits, and nothing else.
3. The third allows the Chief to terminate his employment (i.e., resign) for any reason upon 30 days prior written notice. Under this method the Chief is entitled only to accrued unused and other benefits under applicable City rules, state and federal law, but not to any severance pay or compensation.
4. The fourth allows for the City Manager to terminate the Chief for cause. Under this method, the Chief is not entitled to any severance pay or compensation, other than accrued unused vacation leave. Under this method, the Chief is entitled to prior

² See Appendix A for a complete copy of the Employment Agreement.

written notification of the reasons for the termination, supporting facts, copies of those facts and investigations, and five days to respond, orally or in writing or both to the City Manager, and he may ask, as a matter of right, for a new hearing of the facts before the City Council. The City Council may reverse the City Manager, in which case the City Manager may terminate the Chief without cause.

5. The fifth allows the City Manager to terminate the Chief if he has been disabled from performing the functions of the position and it has been medically determined that he is permanently disabled from performing those functions. There is no statement as to what the compensation might be for this kind of termination.

One other section of the Employment Agreement is worth noting. Section 5B provides that the City Manager "**SHALL**" (emphasis added) review and evaluate the performance of the Chief of Police annually. The Chief is entitled to a summary written statement of the evaluation and the opportunity to discuss the evaluation with the City Manager. Contrary to the requirement of the Employment Agreement, the Grand Jury learned in an interview that there was only one written review, done at the end of 2009.

The Settlement Agreement

The Settlement Agreement was a mutual agreement to terminate employment between the City Manager and the former Chief in accordance with section 3A of the Employment Agreement.

To gain a better understanding of the Settlement Agreement and the process leading up to it, some of its sections and terms and their implications are discussed in some depth here.

The Process Leading Up to the Settlement Agreement

Sometime in late 2010, the City Manager initiated a discussion with the Chief for the purpose of achieving a mutual agreement to terminate his employment, as allowed for under the first

method (Section 3A) of his Employment Agreement. These discussions concluded with the negotiated written Settlement Agreement that was signed by both parties on January 7, 2011.³

A Focus on Some of the Sections and Terms of the Settlement Agreement

Section 3 of the Settlement Agreement and General Release described the various promises of each party that will achieve their mutual wish to terminate the Chief's employment. These are paraphrased below:

3.1. The City shall provide the Chief the gross sum of one hundred and twenty-six thousand dollars (\$126,000.000) (the "Settlement Payment"). The Settlement Payment shall be issued to the Chief within five (5) business days of the effective date of the agreement on a check made payable to 'James F. Mulhall.' The parties agree that the Settlement Payment shall be subject to all state and federal withholding requirements.

3.4. The Chief agrees that his signature on this Agreement shall be deemed a voluntary resignation from his employment as Police Chief effective January 7, 2011 ("Resignation").

3.6. The City shall cash out all unused paid administrative leave and vacation leave that has accrued from the Chief's start of employment through January 7, 2011, effective five (5) business days of the effective date of the Agreement. This is subject to all state and federal withholdings and taxes. The Chief does not meet the minimum qualifications for the City to cash out the Chief's unused sick leave.

The Grand Jury learned in an interview that the approximate cash-out value of the former Chief's unused paid administrative leave and vacation leave was about \$35,000.

Under Section 4(g), the Chief was given seven days to revoke the Settlement Agreement, so the Effective Date of the Agreement was January 14, 2011.

³ See Appendix B for the SETTLEMENT AGREEMENT AND GENERAL RELEASE

Implications of the Settlement Agreement: Termination Without Cause

Had the Chief been terminated by the City without cause, he would have been entitled to six months' salary and benefits. His base annual salary for fiscal year 2010 was approximately \$132,833.⁴ Six months' salary would have been approximately \$66,414. The Grand Jury learned in an interview that the City initially offered a settlement payment of \$106,000 in exchange for the mutual termination agreement and that this amount equaled six months' salary and benefits.

Implications of the Settlement Agreement: Resignation vs. Mutual Termination Agreement

A true resignation is not the same as a mutual termination agreement. Had the Chief resigned in accordance with the terms of his Employment Agreement he would have given the City a 30-day prior written notice. He would have continued to receive his normal salary and to accrue his normal benefits within this 30-day notice period. At the end of this 30-day period, he would be paid only for his accrued unused benefits. He would not have been entitled to any Settlement Payment.

A mutual termination enables the City to transition smoothly from the former Chief of Police to a new Acting Chief of Police. It avoids the potential of a case going to court over diverse claims each party may make, and the potential higher dollar costs associated with attorneys' fees and other stresses associated with a court case.

The Grand Jury does not know what the City may have saved in dollars as compared with what dollar amount the Chief may have requested initially above and beyond what he was entitled to under any provision of his Employment Agreement.

⁴ "City of Atascadero Compensation and Cost Information Calendar Year 2010," p. 1; (<http://www.atascadero.org/files/AS/2010%20Executive%20Salary%20and%20Benefit%20Info%281%29.pdf>: accessed 04 May 2011.)

Implications: Transparency is Another Value to Consider in Evaluating the Deal

Transparency is not something that can be reduced essentially to dollars and cents. The way the City disclosed this particular deal to the public engendered community frustration with the City. This is evinced by the assorted news stories and citizen complaints, including those made at the Community Forum time of City Council meetings. The general question was whether the Chief's termination was truly a resignation so he could spend more time with his family or something else entirely, such as a disguised termination for cause. Citizens also expressed a concern about the City's fiduciary accountability to taxpayers.

The Personnel File

The only documents in the Chief's personnel file sent to the Grand Jury by City staff relevant to the Grand Jury's investigation were his Employment Agreement and his resignation letter.

CONCLUSIONS

The Grand Jury determined that the way the City chose to disclose the story about the mutual agreement to terminate the Chief's employment led to public confusion and complaints of the City being insufficiently transparent with respect to its expenditures.

The Grand Jury is satisfied that the negotiation process which resulted in the mutual agreement method of termination was fair because under the Settlement Agreement the former Chief was advised he had a right to the assistance of counsel before he signed it, which he waived. He also had a right to revoke the Settlement Agreement before its effective date, which he did not invoke.

The Grand Jury determined that the former Chief's Employment Agreement entitled him to an annual written performance evaluation by the City Manager. The Grand Jury learned in an interview that the Chief received one written evaluation in 2009. The disparity between a

required formal written annual performance evaluation and continuing a practice that does not meet this standard warrants a further review by the City Council to determine what, if any risks, it might present to the City in the future.

FINDINGS

1. There was no violation of law or other improper action by the City Manager of Atascadero in negotiating and signing a mutual agreement to terminate the employment of the former Chief in accordance with Section 3A of the former Chief's Employment Agreement.
2. The City of Atascadero's announcement on January 7, 2011 that the former Chief of Police resigned his position in order to spend time with his family omitted any announcement of the fact that the former Chief had at the same time signed a Settlement Agreement with a Settlement Payment of \$126,000.
3. The City Manager released the Settlement Agreement only in response to a public information request.
4. The City's partial and sequential disclosure of the circumstances surrounding the mutual agreement to terminate the employment of the former Chief exposed the City to media and community complaints about a lack of transparency from the City.
5. A disparity existed between Section 5B of the former Chief's Employment Agreement and what the Grand Jury learned was the actual evaluation process the former Chief received.

RECOMMENDATIONS

1. The City of Atascadero should review and consider an appropriate revision to the process by which its personnel decisions are disclosed to the public. This recommendation relates to Findings 2, 3, and 4.
2. The City Council should review the possible risk it is exposed to by a disparity between an Employment Agreement that requires the City Manager to provide a written annual review and an actual practice that does not conform to this provision. This recommendation relates to Finding 5.

REQUIRED RESPONSES

The City of Atascadero is required to respond to Findings 1-5 and Recommendations 1-2. The responses shall be submitted to the Presiding Judge of the San Luis Obispo County Superior Court by **September 14, 2011**. Please provide a paper copy and an electronic version of all responses to the Grand Jury.

The mailing addresses for delivery are:

Presiding Judge	Grand Jury
Presiding Judge Charles S. Crandall Superior Court of California 1050 Monterey Street San Luis Obispo, CA 93408	San Luis Obispo County Grand Jury P.O. Box 4910 San Luis Obispo, CA 93402

The email address for the Grand Jury is: GrandJury@co.slo.ca.us

APPENDICES

APPENDIX A: EMPLOYMENT AGREEMENT

APPENDIX B: SETTLEMENT AGREEMENT AND GENERAL RELEASE

EMPLOYMENT AGREEMENT

THIS AGREEMENT, (hereinafter referred to as the "Agreement") is made and entered into this 29th day of December 2007, by and between the City of Atascadero, County of San Luis Obispo, State of California, a municipal corporation (hereinafter referred to as the "City") and James F. Mulhall (hereinafter referred to as "Mulhall").

SECTION 1 EMPLOYMENT

A. The City agrees to and shall employ Mulhall as the Chief of Police of the City of Atascadero. Mulhall agrees to perform the functions and duties of the position of Chief of Police of the City of Atascadero as described by state law, the Municipal Code of the City of Atascadero, the job description of the position of Chief of Police as developed by the City Manager of the City, and all other duties and functions as the City Manager of the City shall from time to time assign.

B. Mulhall agrees to perform all such functions and duties to the best of his abilities and in a competent and efficient manner. Mulhall agrees to focus his full professional time, ability and attention to City business during the term of this Agreement and agrees not to engage in any other business pursuits whatsoever or directly or indirectly render any services of a business, commercial or professional nature to any other person or organization, whether for compensation or otherwise, without the prior written consent of the City Manager.

SECTION 2 TERM

A. Mulhall shall serve at the will and pleasure of the City Manager. Nothing in this Agreement shall prevent, limit or otherwise interfere with the right of the City Manager to terminate the employment of Mulhall at any time and for any reason, or for no reason, subject only to the provisions specified in Section 3 of this Agreement.

B. This Agreement shall become effective on December 29, 2007, and unless otherwise terminated under the provisions of Section 3, shall remain in effect indefinitely.

C. Nothing in this Section shall or is intended to prevent, limit or otherwise interfere with the right of the City or Mulhall to terminate the employment of Mulhall prior to the expiration of this Agreement, or any extension thereof, in accordance with Section 3 of this Agreement.

SECTION 3 TERMINATION

A. The City Manager and Mulhall may agree mutually in writing to terminate Mulhall's employment.

B. The City may terminate Mulhall's employment at any time without cause. In the event that Mulhall is terminated by the City and Mulhall is otherwise ready, willing and able to perform his duties under this Agreement, the City shall pay Mulhall severance compensation equal to six (6) months of salary and benefits. In consideration of this severance payment, Mulhall agrees that he shall not be entitled to any other payment or compensation of any kind from the City in connection with the termination of his employment.

C. Mulhall may terminate his employment at any time for any reason by providing 30 days prior written notice to the City Manager. In the event that Mulhall provides such written notice, he shall be entitled to receive at the termination of this employment only such accrued unused and other such benefits as may be due and payable under applicable City rule, regulation or policy, and/or under applicable local, state or federal law. Mulhall shall not, however, be entitled to any severance pay or other compensation at the termination of his employment. During the period subsequent to Mulhall's submission of his notice terminating his employment, he shall continue to perform his duties as Chief of Police pursuant to this Agreement unless removed from those duties and/or terminated by the City Manager pursuant to the terms of this Agreement. However, in the event that Mulhall is then removed from those duties and/or terminated by the City Manager, Mulhall shall continue to receive compensation in the form of salary and benefits through the completion of the 30 (thirty) day notice period.

D The City Manager may terminate Mulhall's employment for cause. In the event that Mulhall is terminated for cause, he shall not be entitled to the payment of any severance pay or compensation, other than the payment of accrued unused vacation leave. In the event that Mulhall is terminated for cause, Mulhall shall be entitled to prior written notification of the reason(s) for the termination, the facts upon which such reason(s) are based, copies of all supporting evidence and investigations regarding the facts and reason(s) for the termination, and the right to respond, orally or in writing or both, to the City Manager within five (5) working days of receipt of the notice of such termination. Furthermore, if requested by Mulhall, Mulhall shall have the right to a hearing before the City of Atascadero City Council which shall be a hearing de novo. In the event the decision to terminate for cause is reversed by the City Council and the City Manager terminates Mulhall's employment without cause, the terms of Subsection B hereof shall apply.

E. The City Manager and/or Mulhall may terminate this Agreement in the event that Mulhall has been unable to perform the essential functions of his position due to disability for a period of three (3) months and it is medically determined that Mulhall is permanently disabled from performing the essential functions of his position.

1 A determination that Mulhall is permanently disabled shall be made by the City Manager based upon competent medical evidence and evaluation and in accord with the applicable state and federal laws pertaining to the protection of disabled persons. Any determination that Mulhall is permanently disabled shall be made in accord with the laws governing the city's membership in Cal PERS.

2 In the event it is determined by the City Manager that a question exists as to Mulhall's ability to perform the essential functions of his position, based upon objective facts, the City Manager may require Mulhall to undergo a fitness for duty examination. Nothing in this subsection shall obligate Mulhall to waive his right to privacy under California Civil Code § 56 10(c)(8), nor shall the City seek any report pursuant to this subsection beyond that to which it would be entitled under California Civil Code § 56 10(c)(8).

SECTION 4 SALARY AND COMPENSATION

A. Effective upon the commencement of this Agreement, the City shall pay to Mulhall a base salary within salary range PD58. This salary shall be paid on a pro rata basis in regular installments pursuant to the City's normal payroll procedures.

B The City Manager may set forth annually in writing certain goals consisting of duties and responsibilities above and beyond Mulhall's ordinary duties and responsibilities. In the event that Mulhall achieves such goals, he may be entitled to receive other compensation in addition to his regular salary and benefits. The City Manager shall set forth the amount of additional compensation to which Mulhall would be entitled in the same writing setting forth the annual goals. Any such additional compensation will be at the discretion of the City Manager with the approval of the City council if necessary.

C The City shall deduct or withhold from Mulhall's salary any and all sums as Mulhall 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 and retirement or pension plans.

D In addition to the compensation set forth in Sub-Section A above, Mulhall shall be entitled to receive the same benefits as are accorded all other mid management employees except as herein provided. Mulhall shall be entitled to the following benefits:

a. In addition to benefits described herein, Mulhall shall be entitled to the same benefits granted to executive management employees. As used herein, benefits include, but are not limited to, vacation, sick leave, holiday pay, retirement (PERS) benefits and payments, health insurance, dental insurance, vision insurance, and life insurance. Paid vacation leave accrual shall be based upon completion of seven years of service, after two additional years of service the accrual shall increase to 7.75 hrs/pp and after two more additional years (total of four years service) the accrual shall increase to 8.61 hrs/pp.

b. Eighty (80) hours of Administrative Leave shall be granted per fiscal year to be used within that fiscal year.

E. In its sole discretion, the City may increase Mulhall's base salary and/or other benefits beyond those set forth in this Agreement in such amounts and/or to such an extent as may be recommended by the City Manager on the basis of a salary review made at least annually by the City Manager. Any such increases shall be subject to the approval of the City of Atascadero City Council as required.

F. The City shall provide Mulhall with an automobile to be used for City business. The Chief of Police is on call 24 hours per day and as such is provided a take home vehicle equipped with emergency equipment and a radio to be able to respond to an emergency situation as per IRS Code 1.274-5T (k) (1)-(8). Due to the nature of Mulhall's responsibilities as Chief of Police, the City understands and will permit Mulhall incidental personal use of this automobile. Personal use of the automobile shall require the approval of the City Manager.

G. The City shall permit Mulhall to attend, at City expense, a reasonable number of local, state and national conferences relevant to his duties and responsibilities as Chief of Police with the approval of the City Manager.

H. The City Manager shall fix any other terms and conditions of employment relating to Mulhall's performance as the City Manager 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.

I. Any provisions of the City code, rules, regulations and ordinances relating to management employee benefits as they now exist or may later be amended shall also apply to Mulhall, in addition to any benefits set forth in this Agreement, except as those provisions of the City code, rules, regulations and ordinances relating to management employee benefits may conflict or be inconsistent with the terms of this agreement, in which case the terms of this Agreement shall control.

SECTION 5 PERFORMANCE EVALUATION

A. Annually, the City Manager with the assistance of Mulhall, may define such goals and performance objectives which the City Manager determines necessary for the proper operation of City's Police Department and shall further establish a relative priority among those various goals and objectives. These goals and objectives shall be reduced in writing and should be reasonably attainable within the time limitations specified by the City Manager and in light of the appropriations provided through the annual operating and capital budgets.

B. The City Manager shall review and evaluate Mulhall's performance annually. This review and evaluation shall take into account any goals that may have been developed by the City Manager as well as Mulhall's performance of other functions and duties. The City Manager shall provide to Mulhall a summary written statement of the evaluation and shall provide Mulhall with the opportunity to discuss the evaluation with the City Manager.

SECTION 6 GENERAL PROVISIONS

A. This Agreement constitutes the sole understanding and agreement of the City and Mulhall with respect to the matters set forth herein and supersedes any and all prior negotiations, statements, instructions, representations or agreements, 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.

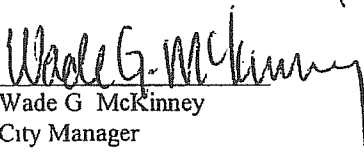
D. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions shall nevertheless continue in full force and effect.

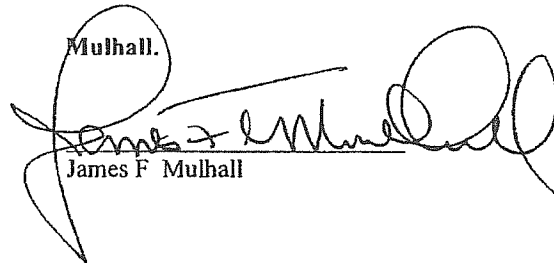
that party may be entitled.

F This Agreement shall be governed by and construed in accordance with the laws of the State of California.

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

CITY


Wade G McKinney
City Manager


James F Mulhall

APPENDIX B

SETTLEMENT AGREEMENT AND GENERAL RELEASE

1. PARTIES

The parties to this Settlement Agreement and General Release (the "AGREEMENT") are James F. Mulhall ("MULHALL") and the City of Atascadero, a public entity (the "CITY") (collectively, the "PARTIES").

2. RECITALS

2.1. MULHALL has been employed by the CITY since January 22, 2007. MULHALL was originally appointed to the position of Police Lieutenant, and was promoted to the position of Police Chief, an at-will position, on December 29, 2007, and MULHALL currently holds the position of Police Chief ("EMPLOYMENT").

2.2. MULHALL and the CITY entered into an employment agreement dated December 29, 2007, which sets forth the terms and conditions of MULHALL'S employment, including the fact that MULHALL serves at the will of the City Manager ("EMPLOYMENT AGREEMENT").

2.3. Pursuant to Section 3.A. of the EMPLOYMENT AGREEMENT, the PARTIES wish to mutually terminate MULHALL'S EMPLOYMENT ("TERMINATION").

2.4. The PARTIES wish to amicably resolve MULHALL'S EMPLOYMENT. Both MULHALL and the CITY desire to resolve issues of any kind between them, including, but not limited to, all issues of every kind or nature arising out of or related to his EMPLOYMENT and the EMPLOYMENT AGREEMENT. Neither MULHALL nor the CITY admits any wrongdoing, and this AGREEMENT is in no way an admission of liability by any party or that any allegations made by any party against another party have merit.

3. CONSIDERATION

3.1. In exchange for the promises and releases set forth herein, the CITY shall provide MULHALL the gross sum of one hundred and twentysix thousand DOLLARS (\$126,000.00) (the "SETTLEMENT PAYMENT"). The SETTLEMENT PAYMENT shall be issued to MULHALL within five (5) business days of the EFFECTIVE DATE of this AGREEMENT on a check made payable to "James F. Mulhall." The PARTIES agree that the SETTLEMENT PAYMENT shall be subject to all state and federal withholding requirements.

3.2. In further exchange for the releases and promises set forth herein, the CITY agrees not to pursue a termination for cause under Section 3.D of the EMPLOYMENT AGREEMENT, and MULHALL agrees to waive any and all rights he may have to notice and appeal under Section 3.D of the EMPLOYMENT AGREEMENT or under any other law or basis.

3.3. The CITY agrees to provide MULHALL with a positive reference for future employment, upon the request of MULHALL (the "REFERENCE").

3.4. In exchange for the SETTLEMENT PAYMENT, MULHALL agrees that his signature on this AGREEMENT shall be deemed a voluntary resignation from his employment as a Police Chief effective January 7, 2011 ("RESIGNATION").

3.5. In addition, MULHALL hereby, and for his heirs, representatives, successors, and assigns, releases, acquits, and forever discharges the CITY, its past and present employees, agents, officers, representatives, insurers, and attorneys, and its predecessors, successors, and assigns, and all persons acting by, through, under, or in concert with any of them, and each of them, from any and all claims, charges, complaints, liabilities, obligations, promises, benefits, agreements, controversies, costs, losses, debts, expenses, damages, actions, causes of action, suits, rights, and demands of any nature whatsoever, known or unknown, suspected or unsuspected ("MULHALL'S CLAIMS"), which MULHALL now has or may acquire in the future, which relate to or arise out of his EMPLOYMENT, the EMPLOYMENT AGREEMENT, the TERMINATION, the RESIGNATION, the SETTLEMENT PAYMENT, the REFERENCE, the LEAVE PAYMENT, or any act, omission, occurrence, condition, event, transaction, or thing which was done, omitted to be done, occurred or was in effect at anytime from the beginning of time up to and including the EFFECTIVE DATE, without regard to whether MULHALL'S CLAIMS arise under federal, state, or local constitutions, statutes, rules, regulations, or common law. MULHALL expressly acknowledges that MULHALL'S CLAIMS forever barred by this AGREEMENT specifically include, but are not limited to, claims based upon any alleged breach of CITY resolution, ordinance, or other policy, claims based upon any alleged breach of EMPLOYMENT AGREEMENT, any demand for wages, overtime, or benefits, any alleged breach of any duty arising out of contract or tort, any alleged wrongful termination in violation of public policy, any alleged breach of any express or implied contract for continued employment, any alleged harassment, any alleged retaliation, any alleged employment discrimination or unlawful discriminatory act, or any claim or cause of action including, but not limited to, any and all claims whether arising under any federal, state or local law prohibiting breach of EMPLOYMENT AGREEMENT, wrongful termination, or employment discrimination based upon age, race, color, sex, gender, sexual orientation, religion, creed, physical or mental disability, medical condition, national origin, veteran status, or any other protected category or characteristic, and any and all rights or claims arising under the *Labor Code*, the Peace Officers Procedural Bill of Rights, the Federal Fair Labor Standards Act, the California Fair Employment and Housing Act, the Americans With Disabilities Act, Title VII of the Civil Rights Act of 1964, and any other federal, state, or local civil rights, employment discrimination, or employee rights statute, rule, or regulation.

3.6. Paid Leave Benefits. As required by law and the EMPLOYMENT AGREEMENT, the CITY will, within five (5) business days of the EFFECTIVE DATE of this AGREEMENT, shall cash out all unused paid administrative and vacation leave that has accrued from MULHALL'S start of employment through January 7, 2011 ("LEAVE PAYMENT"). This payment shall be subject to all federal and state withholdings and taxes. The PARTIES agree that there shall be no cash out of any unused sick leave under Resolution No. 2009-048 because MULHALL does not meet the minimum qualifications for that benefit.

4. **SPECIFIC ACKNOWLEDGEMENT OF WAIVER OF CLAIMS UNDER THE ADEA AND OWBPA**

The Age Discrimination in Employment Act of 1967 ("ADEA") makes it illegal for an employer to discharge any individual or otherwise discriminate with respect to the nature and

privileges of an individual's employment on the basis that the individual is age forty or older. The Older Workers Benefit Protection Act ("OWBPA", 29 U.S.C. §§ 626, *et. seq.*, Pub L 101-433, 104 Stat. 978 (1990)) further augments the ADEA and prohibits the waiver of any right or claim under the ADEA unless the waiver is knowing and voluntary. By entering into this AGREEMENT, MULHALL acknowledges that he is knowingly and voluntarily, for just compensation in addition to anything of value to which MULHALL was already entitled, waiving and releasing any rights he may have under the ADEA and/or OWBPA. MULHALL further acknowledges that he has been advised and understands, pursuant to the provisions of the ADEA and OWBPA, that:

- (a) this waiver/release is written in a manner understood by MULHALL;
- (b) MULHALL is aware of and has been advised of his rights under the ADEA and OWBPA, and of the legal significance of his waiver of any possible claims he currently may have under the ADEA, OWBPA, or similar age discrimination laws;
- (c) MULHALL is entitled to a reasonable time of at least twenty-one (21) days within which to review and consider this AGREEMENT, and the waiver and release of any rights he may have under the ADEA, the OWBPA, or similar age discrimination laws, but he may, in the exercise of his own discretion, sign or reject this AGREEMENT at any time before the expiration of the twenty-one (21) days;
- (d) the waivers and releases set forth in this AGREEMENT shall not apply to any rights or claims that may arise under the ADEA and/or OWBPA after the EFFECTIVE DATE of this AGREEMENT;
- (e) MULHALL has been advised by this writing that he should consult with an attorney prior to executing this AGREEMENT;
- (f) MULHALL is aware of his right to discuss this waiver and release with legal counsel of choice and he does not need any additional time within which to review and consider this AGREEMENT or engage in further discussions with said legal counsel;
- (g) MULHALL has seven days following the parties' full and complete execution of this AGREEMENT to revoke the AGREEMENT (the date of expiration of this seven-day period shall be referred to as the "EFFECTIVE DATE"). The revocation must be in writing and received by the CITY'S counsel, Kelly A. Trainer, Esq., Burke, Williams & Sorensen, LLP, 2875 Michelle Drive, Suite 350, Irvine, California, 92606, within the revocation period; and
- (h) this AGREEMENT shall not be effective until the EFFECTIVE DATE.

5. UNKNOWN CLAIMS

MULHALL represents that it is his intention in executing this document that this AGREEMENT shall be effective as a bar to each and every claim, demand, suit, action, cause of action, debt, attorneys' fees and costs, and the claims hereinabove specified, whether known or unknown, suspected or unsuspected; and in furtherance of this intention MULHALL HEREBY EXPRESSLY WAIVES ALL RIGHTS AND BENEFITS CONFERRED UPON HIM BY THE

PROVISIONS OF SECTION 1542 OF THE CIVIL CODE OF CALIFORNIA, WHICH MULHALL UNDERSTANDS PROVIDES AS FOLLOWS:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Notwithstanding Section 1542 of the Civil Code of California, MULHALL expressly consents that this AGREEMENT shall be given full force and effect according to each and all of its express terms and provisions, including as well those relating to unknown and unspecified claims, demands, suits, actions, causes of action and debts, if any, and those relating to any other claims, demands, suits, actions, causes of action and debts hereinabove specified. This release and waiver includes, among others, claims based on age discrimination arising under the federal Age Discrimination in Employment Act and applicable state law, and attorneys' fees and costs.

6. WAIVER OF ADDITIONAL CLAIMS

MULHALL hereby waives any provisions of state or federal law that might require a more detailed specification of the claims being released pursuant to the provisions of Paragraphs 3, 4, and 5, above.

7. REPRESENTATIONS AND WARRANTIES

Each of the parties to this AGREEMENT represents and warrants to, and agrees with, each other party as follows:

7.1. Advice of Counsel: Each party is aware of his or its right to receive or has received independent legal advice from its attorney(s) with respect to the advisability of making the settlement provided for herein, with respect to the advisability of executing this AGREEMENT, and with respect to the meaning of California Civil Code Section 1542.

7.2. No Fraud in Inducement: No party (nor any officer, agent, employee, representative, or attorney of or for any party) has made any statement or representation or failed to make any statement or representation to any other party regarding any fact relied upon in entering into this AGREEMENT, and neither party relies upon any statement, representation, omission, or promise of any other party (or of any officer, agent, employee, representative, or attorney of or for any party) in executing this AGREEMENT, or in making the settlement provided for herein, except as expressly stated in this AGREEMENT. Each term of this AGREEMENT is contractual and not merely a recital.

7.3. Independent Investigation: Each party to this AGREEMENT has made such investigation of the facts pertaining to this settlement and this AGREEMENT and all the matters pertaining thereto, as it deems necessary.

7.4. Comprehension and Authority: Each party or responsible officer thereof has read this AGREEMENT and understands the contents hereof. Any of the employees executing this AGREEMENT on behalf of the CITY are empowered to do so and hereby bind the CITY.

7.5. Mistake Waived: In entering into this AGREEMENT and the settlement provided for herein, each party assumes the risk of any misrepresentation, concealment, or mistake. If any party should subsequently discover that any fact relied upon by it in entering into this AGREEMENT was untrue, or that any fact was concealed from it, or that its understanding of the facts or of the law was incorrect, such party shall not be entitled to any relief in connection therewith, including without limitation on the generality of the foregoing any alleged right or claim to set aside or rescind this AGREEMENT. This AGREEMENT is intended to be and is final and binding between the parties, regardless of any claims of misrepresentation, promise made without the intent to perform, concealment of fact, mistake of fact or law, or any other circumstance whatsoever.

7.6. Later Discovery: Each party is aware that it may hereafter discover claims or facts in addition to or different from those it now knows or believes to be true with respect to the matters related herein. Nevertheless, it is the intention of the parties to fully, finally, and forever settle and release all such matters, and all claims relative thereto, which do now exist, may exist, or have previously existed between MULHALL and the CITY. In furtherance of such intention, the releases given by MULHALL here shall be and remain in effect as full and complete releases of all such matters, notwithstanding the discovery or existence of any additional or different claims or facts relative thereto.

7.7. Ownership of Claims: MULHALL represents and warrants as a material term of this AGREEMENT that he has not heretofore assigned, transferred, released, or granted, or purported to assign, transfer, release, or grant, any of the CLAIMS disposed of by this AGREEMENT. In executing this AGREEMENT, MULHALL further warrants and represents that none of the CLAIMS released by them hereunder will in the future be assigned, conveyed, or transferred in any fashion to any other person and/or entity.

7.8. Indemnification: The parties agree to indemnify and hold harmless each other, and their respective employees and agents, from, and against, any and all claims, damages, or liabilities sustained by them as a direct result of the violation or breach of the covenants, warranties, and representations undertaken pursuant to the provisions of this AGREEMENT.

7.9. Future Cooperation: The parties will execute all such further and additional documents as shall be reasonable, convenient, necessary, or desirable to carry out the provisions of this AGREEMENT.

8. MISCELLANEOUS

8.1. No Admission: Nothing contained herein shall be construed as an admission by the parties of any liability of any kind. Each of the parties hereto denies any liability in connection with any claim and intends hereby solely to avoid litigation and buy its peace.

8.2. Governing Law: This AGREEMENT has been executed and delivered within the State of California, and the rights and obligations of the parties shall be construed and enforced in accordance with, and governed by, the laws of the State of California.

8.3. Full Integration: This AGREEMENT is the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior and contemporaneous oral and

written agreements and discussions. This AGREEMENT may be amended only by a further agreement in writing, signed by the parties.

8.4. Continuing Benefit: This AGREEMENT is binding upon and shall inure to the benefit of the parties, their respective agents, employees, representatives, officers, attorneys, insurers, assigns, heirs, and successors in interest.

8.5. Joint Drafting: Each party has cooperated in the drafting and preparation of this AGREEMENT and no party shall be deemed to have been the drafter of this AGREEMENT. Hence, this AGREEMENT shall be construed within its fair meaning, and not against any party.

8.6. Severability: In the event that any term, covenant, condition, provision, or agreement contained in this AGREEMENT is held to be invalid or void by any court of competent jurisdiction, the invalidity of any such term, covenant, condition, provision, or agreement shall in no way affect any other term, covenant, condition, provision, or agreement and the remainder of this AGREEMENT shall still be in full force and effect.

8.7. Titles: The titles included in this AGREEMENT are for reference only and are not part of the terms of this AGREEMENT, nor do they in any way modify the terms of this AGREEMENT.

8.8. Counterparts: This AGREEMENT may be executed in counterparts, and when each party has signed and delivered at least one such counterpart, each counterpart shall be deemed an original, and, when taken together with other signed counterparts, shall constitute one AGREEMENT, which shall be binding upon and effective as to all parties as of the EFFECTIVE DATE.

8.9. Non-Disparagement: MULHALL and the CITY agree that each shall not disparage the other party, or any of the other party's employees, agents, officers, or attorneys, to any other person or entity, verbally, in writing, or through any other form of communication. The CITY agrees that this provision shall be binding upon its officers, managing agents, and supervisors. MULHALL understands and agrees that this agreement not to disparage the CITY may affect what he may state in future employment applications and interviews, in addition to other contexts where he may be called upon to discuss the CITY and his relationship thereto. MULHALL and the CITY agree, however, that this non-disparagement provision shall not apply with regard to truthful testimony that is given in compliance with a subpoena, court order, or other compulsory legal process. In the event that MULHALL or the CITY is subpoenaed or ordered by the court or believes that the party may be compelled by legal process to give testimony that will disparage the other party, such party shall immediately notify the other party in writing in accordance with paragraph 8.10 so as to give the party the opportunity to object before the appropriate court. MULHALL and the CITY acknowledge and agree that this non-disparagement provision is a material element of the CITY'S, and MULHALL'S agreement hereto.

8.10. Notice: Any and all notices given to any party under this AGREEMENT shall be given as provided in this paragraph. All notices given to either party shall be made by certified or registered United States mail, or personal delivery, at the noticing party's discretion, and addressed to the parties as set forth below. Notices shall be deemed, for all purposes, to have been

given on the date of personal service or three consecutive calendar days following deposit of the same in the United States mail.

As to MULHALL:
James F. Mulhall

[REDACTED]

As to the CITY:
Wade McKinney
City Manager
City of Atascadero
6907 El Camino Real
Atascadero, CA 93422

And Kelly A. Trainer, Esq.
Burke, Williams & Sorensen, LLP
2875 Michelle Drive, Suite 350
Irvine, California, 92606

WHEREFORE, the parties hereto have consulted with their respective attorneys, read all of the foregoing, understand the same, including the specific waiver of claims under the ADEA and OWBPA, and agree to all of the provisions contained herein.

DATED: January 7, 2011



JAMES F. MULHALL

DATED: January 7, 2011

CITY OF ATASCADERO

By: 

WADE MCKINNEY, CITY MANAGER

Approved as to Form:

None

Representative for James F. Mulhall

Kelly A. Trainer, Esq.
Burke, Williams & Sorensen, LLP
Counsel for the City of Atascadero

given on the date of personal service or three consecutive calendar days following deposit of the same in the United States mail.

As to MULHALL:

James F. Mulhall


As to the CITY:

Wade McKinney
City Manager
City of Atascadero
6907 El Camino Real
Atascadero, CA 93422

And

Kelly A. Trainer, Esq.
Burke, Williams & Sorensen, LLP
2875 Michelle Drive, Suite 350
Irvine, California, 92606

WHEREFORE, the parties hereto have consulted with their respective attorneys, read all of the foregoing, understand the same, including the specific waiver of claims under the ADEA and OWBPA, and agree to all of the provisions contained herein.

DATED: _____

JAMES F. MULHALL

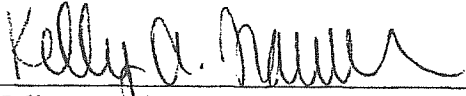
DATED: _____

CITY OF ATASCADERO

By: _____
WADE MCKINNEY, CITY MANAGER

Approved as to Form:

Representative for James F. Mulhall



Kelly A. Trainer, Esq.
Burke, Williams & Sorensen, LLP
Counsel for the City of Atascadero