



A Tradition of Stewardship
A Commitment to Service

NAPA COUNTY GRAND JURY

2008-2009

Final Report on

AMERICAN CANYON FIREFIGHTERS INCENTIVE PAYMENTS: The Cost of Lack of Transparency

TABLE OF CONTENTS

1. Letter to Presiding Judge	
2. Letter to Citizens of Napa County	
3. American Canyon Firefighters Educational Incentive Payments: <i>The Cost of Lack of Transparency</i>	
a) Summary	1
b) Methodology	3
c) Background	5
4. Discussion	6
a) Life Experience Degrees	6
b) The Approval	7
c) The Investigations	8
d) The Report	9
e) The Lack of Transparency	11
f) The Cost	14
5. Findings	14
6. Recommendations	16
7. Request for Responses	16
8. Glossary	16
9. Appendix	18



NAPA COUNTY GRAND JURY

P.O. BOX 5397

NAPA, CALIFORNIA 94581

A Tradition of Stewardship
A Commitment to Service

June 8, 2009

The Honorable Raymond A. Guadagni
Presiding Judge
Superior Court of the State of California
County of Napa
825 Brown Street
Napa, CA 94559

Dear Judge Guadagni,

Pursuant to Section 933(a) of the California Penal Code, the 2008-2009 Napa County Grand Jury submits to you its Final Report on American Canyon Firefighters Educational Incentive Payments: *The Cost of Lack of Transparency*. Our investigation of this subject was conducted in a manner consistent with the California Penal Code, this Court's Charge, and the historic role of the Grand Jury – to protect the interests of the citizens of Napa County.

This is the tenth in a series of final reports we will be issuing before our term ends. I would like to acknowledge the hard work and dedication of the Grand Jury which our report reflects. It is a privilege and a pleasure to work with them.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "W. Trautman".

William E. Trautman
Foreperson
2008-2009 Napa County Grand Jury



A Tradition of Stewardship
A Commitment to Service

NAPA COUNTY GRAND JURY

P.O. BOX 5397

NAPA, CALIFORNIA 94581

To the Citizens of Napa County:

When the approval and payment of educational incentives to American Canyon firefighters from public funds, based on life experience degrees over the last five (5) years, came to light in the Spring of 2008 and when the American Canyon Fire Protection District (referred to as the District or ACFPD) dealt with the matter in closed sessions and refused to make its investigation fully public, the 2008-2009 Napa County Grand Jury decided to take an independent, in-depth look at this matter and the amount of public funds spent on it.

At the outset of its investigation, the Grand Jury requested the District to permit the Grand Jury to review in confidence the investigation report it was withholding from the public. The District refused this request and thereafter was resistant to the Grand Jury's investigation.

The District has spent approximately \$130,000 in legal fees alone for its investigations of the incentive payments, its efforts to retrieve approximately \$36,000 from the firefighters and its initial efforts to keep the report of its investigation from the public. The District turned the oversight of these matters and its dealings with the Grand Jury over to a lawyer who was also billing the District for his time on the matter (ultimately charging the District more than \$78,000).

Commencing in 2003, the then Fire Chief initially exercised his approval authority in mistaken reliance on the California State Fire Marshal and thus did not determine whether these degrees met the requirements for incentive payments at the time of his approval. These degrees required little or no academic work but instead were issued by an online entity upon application, setting forth the firefighter's life experiences, records of previous course work and payment of a fee (currently \$499). They did not signify any additional education or capability of the firefighters.

On the basis of these degrees, over \$36,000 in educational incentive payments were made to various District firefighters from February 2003 to May 2008, when the payments were terminated. During that time, the District took no action to question these payments until an untraceable email was received by a few District Board members in March 2008.

When this issue surfaced in American Canyon at that time, the District, the Union and the firefighters agreed to, and did, terminate these payments and negotiated changes in the labor agreement to assure that future requirements for incentive pay did not permit use of unaccredited, non-educational degrees. The District then, without first discussing this matter with the former Fire Chief, initiated two different investigations, the first through a law firm in Sacramento chosen by the District's General Counsel (the City Attorney of American Canyon) and the second through a law firm in Scotts Valley also chosen by the

AMERICAN CANYON FIREFIGHTERS EDUCATIONAL INCENTIVE PAYMENTS: The Cost of Lack of Transparency

SUMMARY

The Grand Jury's mandate is to "investigate all branches of ... government to be assured that they are being administered efficiently, honestly, and in the best interests of Napa County citizens." Therefore, when the approval and payment of educational incentives to American Canyon firefighters from public funds, based on life experience degrees over the last five (5) years, came to light in the Spring of 2008 and when the American Canyon Fire Protection District (referred to as the District or ACFPD) dealt with the matter in closed sessions and refused to make its investigation fully public, the 2008-2009 Napa County Grand Jury decided to take an independent, in-depth look at the legitimacy of the approvals, the efficacy of the payments, the propriety of the District's closed-sessions, the refusal to release the investigation report, and the amount of public funds thereafter spent on this matter.

At the outset of its investigation, the Grand Jury requested the District to permit the Grand Jury to review in confidence the investigation report it was withholding from the public. The District refused this request and thereafter was resistant to the Grand Jury's investigation.

The District spent approximately \$130,000 in legal fees alone for its investigations of the incentive payments, its efforts to retrieve approximately \$36,000 from the firefighters and its initial efforts to keep the report of its investigation from the public (see Appendix). The District turned the oversight of these matters and its dealings with the Grand Jury over to a lawyer who was also billing the District for his time on the matter (ultimately charging the District more than \$78,000).

Commencing in 2003, the then Fire Chief initially exercised his approval authority in mistaken reliance on the California State Fire Marshal and thus did not determine whether these degrees met the requirements for incentive payments at the time of his approval. These degrees required little or no academic work but instead were issued by an online entity upon application, setting forth the firefighter's life experiences, records of previous course work and payment of a fee (currently \$499). They did not signify any additional education or capability of the firefighters.

On the basis of these degrees, over \$36,000 in educational incentive payments were made to various District firefighters from February 2003 to May 2008, when the payments were terminated. During that time, the District took no action to question these payments until an untraceable email was received by a few District Board members in March 2008.

When this issue surfaced in American Canyon in the spring of 2008, the District, the Union and the firefighters agreed to, and did, terminate these payments and negotiated changes in the labor agreement to assure that future requirements for incentive pay did not permit use of unaccredited, non-educational degrees. The District then, without first discussing this matter with the former Fire Chief, initiated two different investigations, the first through a law firm in Sacramento chosen by the District's General Counsel (the City Attorney of American Canyon) and the second through a law firm in Scotts Valley also chosen by the General Counsel. Despite the District's goal of transparency, publicly announced on its website, virtually all of the District Board meetings regarding this matter were held in closed session on advice of the District's General Counsel. The law firm representing the *Napa Valley Register* (NVR) in an attempt to obtain the undisclosed investigation report asserted in its pleadings that some of those closed sessions did not comply with The Brown Act. Parenthetically, since the redacted investigation report has been released, the litigation between NVR and the District has been dismissed.

The first report issued by the Sacramento law firm ("the McDonough firm") stated, contrary to the accusations in the untraceable email, the then Fire Chief himself did not have an online life experience degree and did not receive incentive payments for any such degree. This report opined those degrees did not comply with the incentive requirements of the labor agreement and should not have been approved, but that since the payments were approved by the Fire Chief, the firefighters should not have to reimburse the District. The report issued by the Scotts Valley law firm ("the Dawson firm") which conducted a more extensive investigation, was not released to the public by the ACFPD for twenty-three weeks on the alleged basis of attorney-client privilege and personnel records' privacy concerns. The initial decision to not release this report was the subject of the NVR's lawsuit mentioned above. On February 23, 2009, the District finally released a redacted version of the Dawson firm report (Passafuime report). The current firefighters, with the Union's concurrence, will reimburse the District for these payments. A settlement agreement to this effect has been entered into by the District and the Union representing the firefighters. The District declined to provide a copy of the settlement agreement to the Grand Jury.

So what is the aftermath? The District so far has spent approximately \$130,000 on two investigations, defending the *NVR* lawsuit and resisting the Grand Jury's review of this matter. The payments have been terminated and the firefighters will reimburse the District for approximately \$36,000 to cover what has now been admitted were non-conforming incentive payments. The current Fire Chief is trying to move on with the District's vital work. The District lawyers are \$130,000 (or more) richer at the expense of the District's taxpayers.

The Grand Jury recommends the City of American Canyon, the District and its City Attorney strive to create more transparency in the peoples' business in keeping with the goal stated on ACFPD's website. The Grand Jury also recommends that the City of American Canyon and the Fire Protection District consider employing a full-time City Attorney/District General Counsel at less cost to the City than it now spends on a contract attorney and also develop a more effective and economical process to control legal expenses.

METHODOLOGY

Interviews were conducted with the following interviewees:

- Various representatives of the ACFPD
- Various representatives of the City of American Canyon
- Various current and former fire personnel of ACFPD
- Representatives of the State of California Fire Marshal's Office
- Various representatives of the Firefighters' Union, Local 1186

Documents Reviewed included:

- California Certification Training Standards
- Application for Certification and Fee Schedules
- California Department of Forestry and Fire Protection Website (www.osfm.fire.ca.gov)
- California State Fire Training Accredited Academies
- American Canyon Fire Protection District Website (www.amcanfire.com)
- Firefighters Local 1186 letter to the ACFD Board of Directors, dated June 11, 2006 (sic?)
- Diplomas for Sale, Vickie Mabrey Reports Online Diploma Mills, CBS News (www.cbsnews.com), June 15, 2005
- Cal-Tax letter, October 19, 2007 "Sacramento Firefighters Use Dubious Diplomas to Jack Up Pay"
- Alameda University Website (www.almedauniversity.org)
- Keith Caldwell for 5th District Supervisor website (www.votecaldwell.net)
- Keith Caldwell Press Conference Statements, September 26, 2008
- Various emails
- City of American Canyon Agenda and Minutes: Joint City Council and Fire District Board
 - June 3, 2008
 - June 17, 2008
 - July 16, 2008
 - August 5, 2008
 - August 28, 2008
 - September 2, 2008
 - September 16, 2008
 - September 23, 2008
 - February 3, 2009
 - February 23, 2009
 - February 27, 2009
 - March 3, 2009

- Letter dated June 4, 2008 from McDonough, Holland & Allen PC by Iris P. Young to William D. Ross Re: Payment of educational incentives to six firefighters based on degrees issued by Alameda University released to the public
- Letter dated September 22, 2008 from Holmes Roberts and Driver LLP to William D. Ross, Re: Demand for Compliance With the Brown and Public Records Acts
- Letter dated October 2, 2008 from William D. Ross, City Attorney, American Canyon to Isela Castaneda, Esq, Holmes Roberts & Owens Re Records Report
- Letter dated October 7, 2008 from Holmes Roberts & Owen LLP to William Ross RE: Demand for Compliance with Brown and Public Records Acts
- The *Napa Valley Register* (NVR), Report AmCan Firefighters bonuses based on shaky degrees, June 19, 2008
- The NVR, Caldwell responds to firefighter diploma flap, June 24, 2008
- The NVR, American Canyon spent 34K on bad fire bonuses, July 2, 2008
- The NVR, AmCan decides not to reveal fire probe findings, September 18, 2008
- The NVR, Register seeks AmCan Report, September 19, 2008
- The NVR, Show us the real AmCan fire report, by Michael Haley, September 22, 2008
- The NVR, Caldwell calls on AmCan to release report, September 23, 2008
- The NVR, Firefighters obtain degrees from diploma mill, by Dan Ross, September 26, 2008
- The NVR, Firefighters' bonus probe to be made public, October 29, 2008
- The NVR, American Canyon fire bonus report still under wraps, November 20, 2008
- The NVR, Register sues AmCan to obtain report, December 19, 2008
- The NVR, Caldwell blamed for approving firefighter bonuses, February 24, 2009
- The NVR, AmCan firefighter bonus scandal goes back to '02, February 26, 2009
- The NVR, Lessons from a pay scandal, February 26, 2009
- Letter dated September 12, 2008 from Dawson, Passafuime, Bowden & Martinez, including a redacted copy of the evidentiary binder made a part thereof
- Letter dated May 20, 2008 from McDonough Holland & Allen PC to William D. Ross released to the public
- The *Sacramento Bee*, Dubious diplomas boost Calif. Firefighter' pay, article by Andrew McIntosh dated October 7, 2007
- Firefighters Bill of Rights, Assembly Bill No. 220; California Government Code, Section 3250
- CSFM Chief Officer Certification Review Form
- CSFM Application for Certification Form
- List of American Canyon Firefighters CSFM Certifications
- Request to CSFM dated July 20, 2008 under California Public Records Act (redacted)
- CSFM Response dated July 25, 2008 to Public Records Request
- CSFM addendum to Response to Public Records Request
- Copy of Alameda University Associates of Science Degree awarded to an American Canyon firefighter 2/11/2003
- CSFM Fire Training Procedure Manual (January 2008) for Chief Officer and for Fire Marshal

- Letter Agreement dated August 29, 1990 between Ross & Scott by William D. Ross and ACFPD for legal services to ACFPD
- Proposed Letter Agreement dated October 15, 1993 between Ross & Scott by William D. Ross for legal services to American Canyon and ACFPD
- Amendment to Agreement For Legal Services dated February 11, 2004 from William D. Ross to Keith Caldwell, Chief ACFPD
- Memorandum dated April 12, 2004 from William D. Ross to Elizabeth W. McGee, Finance Director, AC
- Various emails and Letters from the District

BACKGROUND

Description of ACFPD – The District

The ACFPD was formed in 1957 by a vote of citizens as a Subsidiary Special District to the City of American Canyon. It covers seven square miles and serves a population of approximately 15,000. American Canyon is a rapidly growing area and the population is predicted to continue to grow. The District has responsibilities beyond the City limits. It is bordered on the south by the City of Vallejo, on the west by the Napa River and on the east by Interstate 80. During the seventies, the governing body was an independent, five person Board of Directors. This has since been changed as the City Council now acts as the District Board of Directors. The Board of Directors appoints the District Fire Chief. The Fire Chief reports to the Board. The Fire Chief of seventeen years retired in 2007 and a new Fire Chief was promoted from Assistant Chief.

One Administrative Assistant supports the firefighter personnel. Other than the Fire Chief, there is no District Manager. ACFPD has a total of fifteen firefighters. All firefighters are either paramedics or emergency medical technicians. There is a residency requirement for firefighters to live within fifty miles. There are also 200 volunteer reserve firefighters; all are residents of American Canyon. Automatic aid response from Vallejo and Napa provides eight more firefighting personnel and additional equipment in response to an emergency incident. The ACFPD is housed in a new Public Safety facility on East Donaldson Way. As a Fire District, 70 percent of its funds are derived by property taxes and fees. It also receives various government grants. Payroll disbursements are handled by the City's Finance Department on direction of the Board and the Fire Chief.

Overview of Events

Over a period of time, commencing in February 2003, eleven former and current ACFPD firefighters were given educational incentive payments based on life experience degrees issued by an online entity calling itself "Alameda University." The then Fire Chief of the District approved the first of these educational incentive payments given, *inter alia*, for an "Associate of Science Fire Degree" based upon the fact the California State Fire Marshal's Office had approved the degree for Chief Officer Certification. The then Fire Chief did this

without investigation or review of the requirements or qualifications for these degrees. Two of the other qualifications for incentive payments, Fire Officer Certification and Chief Officer's Certification, are certifications by the California State Fire Marshal's office. The Grand Jury understands to obtain a Chief Officer's Certification; one must have, and provide evidence to the State Fire Marshal's office of, a college degree. The Fire Officer's Certification does not require a college degree. Only one of the eleven American Canyon firefighters sought and obtained a Chief Officer Certification from the State Fire Marshal using his Alameda degree to meet the college degree requirement. There were ten other firefighters for whom the Fire Chief approved incentive payments based on online degrees.

This issue became public in March 2008 as a result of an anonymous email which suggested the then Fire Chief had received such a degree from Alameda University, a claim that proved to be false. At that time, the then Fire Chief took full responsibility for his approval of these incentive payments and acknowledged, in retrospect, he should not have approved these degrees for incentive payments. Nevertheless, the District undertook two investigations and did so without first consulting with the former Chief. These investigations were coordinated by the District's General Counsel.

DISCUSSION

Life Experience Degrees

According to Alameda University's website (www.alamedauniversity.org), Alameda University is "the foremost leader of scholarly pursuits through online education." It has both undergraduate and graduate online programs. While much has been said about the value or lack thereof of online educational degrees or any institution granting them, the Grand Jury merely focuses on the efficacy of the degrees issued by Alameda to the eleven American Canyon firefighters who used them to obtain incentive pay under the 2002-2007 labor agreement.

These degrees are what Alameda refers to as life experience degrees. They are based on the notion that one's accumulated learning in the real world and expertise in a specific field should be able to earn an associate's, bachelor's, or master's degree that will be documented. The Alameda website lists a number of "potentially qualifying life experiences" as follows: previous university study, non-credit courses, professional accomplishments, employee-sponsored training, certificates of achievement, military training, professional work experience, community service, volunteer activities and others. It makes it clear that college experience is not required to receive a college degree from Alameda University.

One can obtain a Bachelor's Degree from Alameda by first documenting personal verifiable professional and educational achievements in resume format. This would include the types of experiences noted above. Then one "simply" completes Alameda's "user-friendly application form" with as much of the foregoing information as possible and submits it to Alameda. The application is then assigned for review by Alameda "to an appropriate assessor" for evaluation. A response is provided within one to four days. As Alameda's website states:

“If you qualify you could have your degree in less than a month!” The tuition for a Bachelor’s degree is \$499.00 and includes a professionally printed degree suitable for framing; a professionally replicated and laser engraved degree on a plaque mounted on wood; various services such as career guidance, online learning resources and reduced tuition for future degrees; a student transcript based upon the assessment of one’s qualifications and pertinent courses; and third-party verification for employment purposes.

This is the type of degree the American Canyon firefighters received from Alameda and used to seek to qualify for incentive pay. This is essentially a “college degree” obtained simply by submitting a recitation of one’s life experiences and paying a \$499 fee. Obviously, this so-called academic success is truly oppositional to normal American university standards, especially in relationship to fully accredited degrees.

Prior to March 2008, there was publicity both nationally and within the State of California between 2005 and 2007 of the use of online life experience degrees by safety employees to obtain extra compensation.

The Approval

Article 18 b) of the 2002-2007 Labor Agreement (also referred to as an “MOU,” or Memorandum of Understanding) between the District and the Fire Fighters Local 1186, then in existence, provided the District pay an educational incentive as follows:

b) The following incentives will be given to employees on a bi-weekly basis. Each incentive will be equal to 1.5 percent of the current year step, firefighter’s monthly salary to a maximum of 4.5 percent (3 incentives). Employees will be paid 26 times per year.

*Associate of Science Fire Degree
Fire Officers Certification
Bachelors of Science or Arts Degree
Chief Officers Certification.*

Oversight and approval authority of these payments was bestowed by the District Board solely upon the Fire Chief.

The then Fire Chief relied in giving his approval of the Alameda degrees for incentive pay, at least in part, on the fact the California State Fire Marshal accepted an Alameda degree for Chief Officer Certification. However, at the time, the then Fire Chief never discussed the efficacy of these degrees with the California State Fire Marshal’s Office or otherwise checked into them. He continued to approve these educational incentive payments until sometime in 2005. By that time, CBS and other media had reported on Internet sites calling themselves “universities” which offered college degrees based on prior life experiences. As time went on, there were other news reports, one in the *Sacramento Bee* (October 7, 2007) by Andrew McIntosh. As these reports proliferated, the then Fire Chief became suspicious of these degrees and stopped approving them. He did not immediately raise the issue with the

Union for fear of igniting the Union's desire to renegotiate the salary survey issue. But he reminded the Assistant Chief to have the labor agreement changed at the expiration of the 2002-2007 labor agreement to specify that the college degrees must be from an "accredited" college or university to qualify for incentive pay. While accreditation means many things to many people, the Grand Jury does not believe accreditation is the issue here. (Almeda claims to be accredited by at least two institutions). The issue is these Almeda degrees did not require any academic work to obtain and they were not associate or bachelor degrees based on education obtained by attending a college or university. Clearly, obtaining an education by attending a college or university is not the same as obtaining an education through only life experiences.

It seriously stretches credibility to suggest that Article 18.b) of the Labor Agreement with Firefighters Local 1186 contemplated or intended this Almeda type of degree to qualify as an "Associate of Science Fire" or "Bachelor of Science or Arts" for purposes of education incentive pay. The labor agreement provides for the District to pay for "education" approved by the Training Officer (the Fire Chief acted in this capacity). While the then Fire Chief mistakenly relied on the California State Fire Marshal's Office in approving incentive pay to firefighters, the California Fire Marshal's office also acknowledges it made a mistake by accepting an Almeda degree to satisfy the "college degree" requirement for a State Fire Marshal's Chief Officer Certification.

The Investigations

The District Board of Directors, through its General Counsel, retained a Sacramento law firm (McDonough law firm) to give opinions on: 1) whether or not the then Chief had received an Almeda degree and was receiving incentive payments as a result, 2) whether payment of any educational incentive to six firefighters (five of the original eleven had either died or retired) who obtained "degrees" from Almeda University is valid, 3) whether the payments should be stopped immediately and should the payments be reimbursed by the firefighters. The conclusion by the McDonough law firm to the first question was that the then Chief did not have an Almeda degree and did not receive any incentive payments. It answered the second question by opining that since "...firefighters obtained the necessary approval from the Chief, acting as Training Officer...payments made to date should be considered valid." Its answer to the third question was that the payments made to date for any degree issued by Almeda University (or similar institution) should be stopped immediately, but it opined the payments did not have to be reimbursed.

The McDonough firm's opinion states "The 1186 (Labor) Agreement cannot reasonably be read to permit receipt of an education incentive based on only 'life experiences'." The public must receive a tangible benefit for the expenditure of public funds. If a public purpose is not served, the payment is deemed a "gift of public funds" in violation of the California Constitution (Cal. Const. Art. XVI 16) and is invalid. There is no value-added to the employee's ability to do his job better, nor does the District receive any benefit as a result of these Almeda degrees. This opinion was released to the public on June 3, 2008, and any attorney-client privilege pertaining to it has been waived. The cost to the taxpayers of this investigation and report was \$4,332.

The District Board received a letter from the Firefighters' Local 1186 in June 2008 suggesting the idea for obtaining these degrees was originally proposed by the then Fire Chief, which also proved to be false. Shortly thereafter the Board retained, through its General Counsel, a law firm in Scotts Valley (the Dawson law firm) to initiate yet another investigation. The Grand Jury understands this investigation has cost the District in excess of \$43,623. It was reported out of a closed session in the District Board's minutes on September 16, 2008, that a motion to waive the attorney-client privilege "as referenced within the second independent investigation as to public records" failed by a vote of 3 to 2. The report of this second investigation was completed in September 2008, but was not then released to the public. The District's General Counsel stated to the media that at least portions of the report would be released when negotiations with the firefighters regarding reimbursement of the incentive payments were concluded. It was reported out of closed session at the September 16, 2008 District Board meeting the "District staff (including Counsel), meet and confer with Local 1186 after consultation with labor counsel and/or experts, regarding addressing issues associated with the payment of educational incentive, including obtaining recovery consistent with the applicable law." On February 23, 2009, the District and the Union announced they had reached a settlement agreement, which the District refused to provide to the Grand Jury. Also on February 23, 2009, the District finally released to the public a redacted copy of this Passafuime report (the investigation conducted by the Scotts Valley, Dawson law firm).

The Report

Never have so many waited so long for so little. The Passafuime report was commissioned by the District in July 2008 and was addressed and delivered to the ACFPD General Counsel on September 12, 2008. Under a claim of attorney-client privilege, it was not disclosed to the public for twenty-three weeks until February 23, 2009. After the cost of a nine-week investigation and litigation to get this report released, the public and the Grand Jury were presented with a sometimes confusing, inconsistent and speculative recitation based upon the same core facts set forth in news reports and the McDonough report, almost nine months earlier.

The report notes the 2002-2007 Labor Agreement/MOU with Local 1186 "represented a significant shift with reference to the educational incentive pay scheme by not mentioning accreditation." Since the report also points out that the preceding labor agreement/MOU did not contain the accreditation language either, what is the "significant shift"?

Parenthetically, it should be noted that before the parties signed the 2002-2007 Labor Agreement, it was reviewed by at least two attorneys for the District and the five members of the District Board.

The Passafuime report states:

It became apparent that the labor negotiations preceding the 2002-2007 MOU resulted in a perception that the wrong date

*was used for comparable salaries (June 30 instead of July 1) ...
firefighters seeing they had lost up to 4% ...*

...

Our opinion is that it is now more likely than not that the approval of Alameda degrees for incentive pay was a response to the perceived mistake by management in assessing comparable salaries during negotiations.

The premise that the use of comparable salaries as of June 30 instead of July 1 in the 2002-2007 labor agreement was a “management mistake” is belied by the evidence. With no attempt to reconcile the foregoing statements, the report later states there is no evidence that in negotiations over the labor agreement/MOU, the District “deliberately omitted standards for obtaining degrees in order to give firefighters the opportunity to qualify for incentive pay based on worthless degrees from diploma mills.” The report further states “in fact, it appears the negotiations were contentious... the union members perceived that the District had taken a hard line with reference to the comparable salary survey.” This hard line was not a “mistake by management.”

The Passafiume report reaches a questionable conclusion that the then Fire Chief was in an “untenable” position negotiating the Union MOU on behalf of management while serving as the management head of the District. The logic of this position is so confusing that even the NVR mistakenly reported he was negotiating on behalf of the Union (not the District). While that would have been an “untenable” position, it was not what happened. The then Fire Chief, like any chief executive who instructs his or her labor negotiators, led the negotiations for the District to save it the cost of hiring someone to do this for it. It is common; in fact it is quite usual, for the management group which will execute the management side of a MOU to be involved in the negotiations.

On the other hand, the Grand Jury’s investigation confirms that some of the conclusions reached in the Passafiume report are consistent with the evidence found by the Grand Jury. For example, the Grand Jury agrees the allegations against the then Fire Chief in the Firefighters Local 1186 letter were completely unfounded. There not only is no evidence to support the accusations of the then Fire Chief’s conduct, but to the contrary, the evidence more than adequately demonstrates that he neither introduced the firefighters to Alameda, nor encouraged them to obtain these degrees. He merely approved the incentive pay when the degrees were brought to him by the firefighters.

The Passafiume report does not mention that the then Fire Chief was not the only chief safety officer who mistakenly approved these types of degrees for incentive pay. Coast-to-coast, from the New York Police Department to the Sacramento Municipal Fire District, these types of degrees had been allowed to qualify for educational incentive payments. Even the California State Fire Marshal, upon whom the Chief relied, issued a Chief Fire Officer certification to at least five applicants throughout the State using this type of degree to meet the college degree requirements for that certification. The State Fire Marshal did not realize

this until the American Canyon situation came to light and it now intends to revoke these certifications pending receipt of *bona fide* educational degrees.

The Grand Jury also agrees with the Passafuime report when it recites:

It defies common sense ... that any such 'degree' as described, regardless who issues it, or upon what basis it is issued, qualifies for purposes of having obtained the educational incentive under the District's MOUs.

It is absurd to maintain that it was the intent of the District, City Council or Local 1186 to grant salary incentive for ... Alameda degrees.

And that is exactly why accreditation, whether or not the word “accreditation” was in the MOU, is a “red herring.” Alameda claimed it was accredited by some organizations. So it was not determinative whether or not the operative labor agreement/MOU required “accreditation” or not. The point is simply that these were “incentive” payments. The incentive was to reward firefighters for getting more education. The Alameda degrees did not represent more education for the firefighters. That is why the payments based on these degrees were not proper.

The report further notes the “... intent of the parties to the MOU could not have been to confer an illegal benefit” and admits that “the problem is not the contractual provision in the MOU for educational incentive pay, it is the submission and approval of phony degrees to trigger the payments.”

In the end, the report opines that the conduct of those acquiring, submitting, and receiving educational incentive pay from Alameda degrees is not fraud; but notes that presenting a “diploma mill” degree may qualify as “negligent representation.”

The Lack of Transparency

*The people in delegating authority do not give their public servants the right to decide what is good for the people to know and what is not good for the people to know. The people insist on remaining informed so that they may retain control over the instruments they have created.
Section 94950 of the Ralph M. Brown Act.*

The California law, which guarantees the public’s right to attend and participate in local legislative bodies, is the Ralph M. Brown Act (“Brown Act”). The Brown Act is very clear that closed sessions cannot be conducted unless explicitly allowed by the Act. With one notable exception, the firefighter educational incentive payment issue was handled by the ACFPD in joint meetings with the American Canyon City Council and the Fire District Board in closed sessions. The one exception was the June 17, 2008, meeting in which amendments to the labor agreement were adopted and the Board authorized the City Attorney to publicly discuss the findings of the McDonough firm’s investigation. The remaining

closed sessions were justified by the District as being within the requirements for discussion of a “potential litigation” or “negotiation” under the Brown Act. The NVR, after sending the General Counsel of the District two letters demanding the Passafiume report of its investigation, sued the District alleging, *inter alia*, that the District violated the Brown Act by holding several of these closed sessions. Because no minutes are taken in closed sessions, the public has no way of knowing what happened behind closed doors and what was discussed. But the Brown Act does require certain disclosures as prerequisites to the validity of closed sessions to discuss “potential litigation” or “negotiation.” The law recognizes the need for public scrutiny and participation in the dialogue of a particular matter is far more important than protecting governmental officials’ mistakes no matter how sensitive, embarrassing, or controversial they may be. Thus, in order to promote transparency in the people’s business, the authority for closed sessions has been narrowly construed. Justification for a closed session must be found in a specific exception. The relevant Brown Act requirements are as follows:

- Each item to be discussed in closed session must be briefly described on an agenda for the meeting (sec. 54954.2 [a])
- Prior to adjourning into closed session, a representative of the legislative body must orally announce the items to be discussed in closed session (sec. 54957.7 [a])
- The Brown Act contains specific additional requirements for closed sessions regarding pending litigation where the body believes it is subject to a significant exposure to potential litigation (see *infra*) (sec. 54956.9 [b] [3])
- Once the closed session has been completed, the legislative body must reconvene in open session, where it may be required to report votes and actions taken in closed session (sec. 54957.6)
- In case of pending litigation, the legislative body must make reference in the agenda or publicly announce the specific subsection of section 54956.9 under which the closed session is being held (sec. 54956.9[c])
- Closed sessions provisions concerning negotiation specifically require the body to identify the individuals who will be attending the closed session as negotiators. (secs. 54956.8; 54957.6)

The disclosure requirements of section 54956.9 under the Brown Act for closed sessions based on an agency’s “exposure to potential litigation” are as follows:

- Where facts (e.g. incident or transaction) creating the “significant exposure to litigation” are known to potential plaintiffs, they must be publicly stated on the agenda or announced (sec. 54956.9 [b] [3] [B]). If they are not, they do not have to be publicly stated (sec. 54956.9 [b] [3] [A]). These facts had been released in the McDonough report and in news articles.
- Where a claim or other written communication threatening litigation has been received by the agency, reference thereto must be stated on the agenda or announced and the claim or communication must be available for public inspection. (sec. 54957.5 (sec. 54956.9 [a] [3] [C])). The Grand Jury learned there was no litigation threatened here.

- Where a person makes a statement in an open and public meeting threatening litigation, reference to the statement must be publicly stated on the agenda or announced (sec. 54956.9 [b] [3] [D]). Again the Grand Jury found no evidence this occurred in this situation.
- Where a person makes a statement outside of an open and public meeting threatening litigation, the agency may not conduct a closed session unless an agency official having knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting. The same rules apply as in section 54956.9 (b) (3) (c) above. (sec. 54956.9 [b] [3] [E]). The Grand Jury knows of no such statement or any record of same being made.

When a closed session has been completed, the legislative body must convene in open session and announce the action taken. (sec. 54957.7 [b]).

The NVR's attorneys asserted that the closed sessions held by the District on September 16, 2008, September 23, 2008, and September 30, 2008 to discuss the educational incentive payments failed to comply with the Brown Act, Government Code section 54956.9 (b). They first state that sections 54956.9 (b) (1) and (b) (3) (B) only allow closed sessions to confer with counsel based on "facts and circumstances... that might result in litigation against the agency, ...which facts or circumstances shall be publicly stated on the agenda or announced. But the facts and circumstances here do not, these attorneys said, reflect "a significant exposure to litigation" against the District as required to hold a closed session. Second, the NVR's attorneys stated that "even if the description of the facts and circumstances would have been otherwise sufficient to satisfy subsection (b) (1) and (b) (3) (B), the closed sessions were not valid because they were not publicly stated on the agenda or announced aloud...prior to the closed session as required by law." Sec. 54954.5 (c). They note the agenda also failed to identify "significant exposure to litigation" as the basis for the closed sessions.

Since the issue of the District's closed sessions to discuss the incentive payments and the decision to not release the Passafuime investigation report to the public were the subject of litigation, the Grand Jury does not reach any finding or conclusion one way or the other. But as grand juries have done before, the 2008-2009 Grand Jury reminds government officials of the purpose of the Brown Act as stated in section 94950 as follows:

...the legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The District enshrouded this educational incentive issue with its many closed sessions and its refusal to release the Passafuime investigation report upon request. As a result, the District has also spent more public funds to defend the NVR's lawsuit, which sought to make that report public. As noted above, that lawsuit was dismissed after the redacted report was finally released to the public.

The Cost

It “defied common sense” that Alameda degrees would qualify for obtaining incentives and it is “absurd” to maintain otherwise, according to the Passafuime report. Early on, the then Fire Chief stepped up and acknowledged his mistake. The firefighters stepped up and agreed to the termination of the payments to protect their well-deserved fine reputation. Under these circumstances, ACFPD nevertheless spent in excess of \$130,000 to prove what is “common sense.” This is one-third of the entire American Canyon 2008-2009 budget of approximately \$400,000 for all legal services. The District needs to tell its taxpayers why.

Between the fees charged by the McDonough law firm, which did the first investigation and report, the fees charged by the Dawson law firm which did a second investigation and the second report, and the fees charged by the District’s Counsel (the American Canyon City Attorney) who billed in excess of \$78,000 for his time on the matter, and the fees incurred by the District to defend its refusal to release the Passafuime report to the public, the District has spent more than \$130,000 of taxpayers’ money to recover less than \$36,000 in incentive payments from the firefighters. The principle of the matter could have been accommodated after spending the \$4,332 on the first report. The Grand Jury questions whether this was a prudent use of taxpayers’ money. The Grand Jury asks: How much fire equipment to protect the safety and health of the American Canyon community could have been purchased with \$130,000?

FINDINGS

The 2008-2009 Grand Jury finds:

1. Between 2003 and 2007, eleven ACFPD firefighters applied for and received educational incentive payments based on life experience online degrees from Alameda University.
2. At the outset, the then Fire Chief mistakenly relied on the California State Fire Marshal and did not exercise independent judgment to determine whether the Alameda degrees met the requirements for educational incentive payments.
3. \$36,000 in educational incentive payments was made to certain ACFPD firefighters on the basis of Alameda University degrees from February 2003 to May 2008 when the District terminated the payments with the concurrence of the firefighters and the Firefighter’s Union, Local 1186.
4. The Alameda University degrees on which approval of educational incentive payments were based did not meet the incentive pay intent of the labor agreement (Memorandum of Understanding).
5. Oversight and approval authority were bestowed by the District Board solely upon the Fire Chief.
6. As he was retiring, the then Fire Chief told the incoming Chief that the issue of incentive payments needed to be addressed in the Union negotiations after the 2002 and 2007 labor agreement expired.

7. Prior to the receipt of an untraceable email in March 2008, no action was taken by the District to question these educational incentive payments based upon degrees acquired from Alameda University.
8. Between 2005 and 2007, there was publicity, both nationally and within the State of California, of the use by safety employees of online life experience degrees to obtain extra compensation from public employers.
9. When this issue came to light in the spring of 2008, the District, the Union, and the firefighters agreed to terminate such educational incentive payments and negotiated changes in the labor MOU in an attempt to assure the requirements for educational incentive pay did not permit unaccredited, non-educational degrees.
10. In June 2008, the District without first discussing the matter with the former Fire Chief, retained a Sacramento law firm (“McDonough firm”) chosen by the District’s General Counsel to conduct an investigation of the educational incentive payments issue.
11. Contrary to the untraceable email, the McDonough firm investigation determined that the then Fire Chief did not obtain an online life experience degree and received no incentive payments for such a degree.
12. The accusations against the former Fire Chief in the Firefighters’ Local 1186 letter to the District proved to be unfounded and the Passafuime report so opined.
13. The McDonough firm also opined the incentive payments based on these degrees did not comply with the educational incentive pay requirements of the Labor Agreement (MOU) and should not have been approved.
14. The District made the McDonough firm reports public in June 2008.
15. The McDonough firm investigation and report cost the District \$4,332.
16. In July 2008, the District also retained a Scotts Valley law firm (Dawson Firm), selected by the District General Counsel, to conduct a second investigation.
17. The Dawson firm submitted its report of investigation (the Passafuime report) to the District in September 2008.
18. The District withheld the Passafuime report from the public for twenty-three weeks and finally released a redacted version on February 23, 2009.
19. The Passafuime report adds little, if any, new facts not already known from the McDonough firm report and the newspaper accounts.
20. The Dawson/Passafuime firm investigation and report cost the District \$43,623.
21. The NVR sued the District to get the Passafuime report made public before a redacted version was finally released.
22. Virtually all of the District Board’s discussions and decisions regarding the educational incentive payments were in closed session out of the public’s view.
23. One of the District’s stated goals published on its website is “transparency.”
24. In February 2009, the active firefighters who had received incentive payments on the basis of Alameda degrees agreed, pursuant to a settlement agreement between the District, the Union and the firefighters, to reimburse the District for the payments they received. These firefighters will pay back the District approximately \$36,000.
25. The District refused to disclose or make that settlement agreement public.
26. The District has spent approximately \$130,000 in legal fees on the educational incentive payments matter. With costs continuing to be incurred, the final cost is yet to be determined.

27. Fees and costs paid so far to the McDonough and Dawson firms for their investigation, to the Berliner-Cohen firm to defend the NVR lawsuit, and to the District General Counsel make up this \$130,000 (See Appendix).
28. The American Canyon 2008-2009 budget for all legal services is approximately \$400,000.
29. The City of American Canyon and the Fire Protection District contract with an attorney in private practice with offices in Palo Alto and Los Angeles to be its City Attorney and District General Counsel. Neither the City of American Canyon nor the District has a City Attorney or District Counsel who is an employee of the City or District.

RECOMMENDATIONS

The 2008-2009 Grand Jury recommends:

1. The City of American Canyon and the Fire Protection District strive to create more transparency in the people's business.
2. The City of American Canyon and the Fire Protection District develop a process to control legal expenses and evaluate the costs and benefits of employing a full-time city attorney to advise and represent the City and the District.
3. The City of American Canyon and the Fire Protection District create policies and procedures to insure that any future contractual obligations are developed through a Request for Proposals in order to provide for quality and a cost effective means of acquiring such services.
4. The City of American Canyon and the Fire Protection District review, modify, or change policy to insure public access to governmental representatives and vital information that is necessary for the public welfare.

REQUEST FOR RESPONSES

The 2008-2009 Grand Jury requests responses from:

1. American Canyon Fire Protection District Board of Directors on Recommendations: 1,2,3,4.
2. American Canyon Fire Protection District Fire Chief on Recommendations: 1,3,4,
3. City of American Canyon Finance Department/District on Recommendations: 1,2,3
4. City of American Canyon City Council/District Board on Recommendations: 1,2,3,4.

GLOSSARY

AC	City of American Canyon
ACFD	American Canyon Finance Department
ACFPD	American Canyon Fire Protection District

ACFPDBD American Canyon Fire Protection District Board of Directors
ACFF American Canyon Firefighter
CSFM California State Fire Marshal
MOU Memorandum of Understanding
NVR Napa Valley Register
RFP Request for Proposal

APPENDIX

McDonough Law Firm Cost of first investigation and report.....	\$4,332.
Dawson Law Firm Cost of second investigation and report.....	\$43,623.
American Canyon City Attorney/District Counsel Legal Fees and Costs	\$78,102.
American Canyon's Legal Cost to defend NVR lawsuit to release report	\$8,059.
TOTAL COST TO DISTRICT AS OF MARCH, 2009.....	\$134,116.