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MEMORANDUM OF LAW

DATE: April 24, 2009
TO: Mary Lewis, Chief Financial Officer
FROM: City Attorney
SUBJECT: SDCERS' Plan to Operate its Own General Ledger System, Directly Pay System Expenses, and Open a Checking Account

INTRODUCTION

The San Diego City Employees' Retirement System [SDCERS] was established by the City as set forth in the San Diego City Charter and is managed by the SDCERS Board of Administration. S.D. Charter §§ 141, 144. The City Charter requires that all money contributed to the system be placed in a special fund within the City Treasury that operates as a trust fund and is not to be merged with other City funds. S.D. Charter § 145. Payments from this retirement fund are to be made only upon the order of the SDCERS Board of Administration. *Id.*

The City Charter also provides that the City's Chief Financial Officer [CFO], as chief fiscal officer for the City, "shall exercise supervision over all accounts" and report on the "exact financial condition of the City and of each Department, Division and office thereof." S.D. Charter § 39. SDCERS is a City Department. S.D. Muni. Code § 22.1801(b) (enumerating City Departments, including "City Retirement"). The Charter empowers and requires the CFO¹ to examine all "payrolls, bills, and other claims and demands," and states the CFO shall issue a warrant or check-warrant for payment only under certain conditions, including if the CFO finds the amount to be legally due and payable and there is money in the treasury to make the payment. S.D. Charter § 83.

This Office has previously opined that Charter sections delineating the duties of the City Auditor and Comptroller (now CFO) reflect the intent that SDCERS use the Auditor for its

¹ Amendments to Charter section 39, enacted by voters last year, transferred the duties of the Auditor and Comptroller to the CFO.

payroll functions, as SDCERS has done since its inception.² Citing the Charter, this Office has also opined that the Auditor is responsible for issuing checks on behalf of SDCERS for payment of retirement benefits. This Office previously concluded that these functions were not changed by the California Pension Protection Act of 1992 because the Auditor's payroll functions "serve to verify the accuracy of claims made on the Retirement Fund and are essentially ministerial acts." The prior opinion also confirmed that the Board of Administration "continues to hold the ultimate authority and responsibility to determine what draws shall be made on the Retirement Fund, to whom they will be paid, and in what amounts." (See 1998 City Att'y MOL 348, 98-21, attached as Exhibit 1.)

On January 12, 2009, however, SDCERS issued a report from its general counsel opining that SDCERS may nonetheless operate its own general ledger system, including payment of SDCERS' expenses through that system, independently of the City Auditor and Comptroller (CFO). SDCERS' general counsel also concluded that SDCERS could cut its own checks and open its own checking account. As support for this conclusion, the report stated that SDCERS was "an independent entity of the City," despite the Municipal Code section naming it a City Department. The apparent motivation for the SDCERS opinion is that SDCERS allegedly is already investing in a new, independent system that it wishes to have "go live" this summer. SDCERS contends it would be cheaper and more efficient for SDCERS to acquire and install its own general ledger system than it would be for it to use new SAP software to be provided by the City in an upcoming software upgrade. (See January 12, 2009 SDCERS Staff Report, Exhibit 2.) SDCERS contends the City's system is not compatible with its needs and the new system is needed to meet its fiduciary duties.³

In light of this report and SDCERS' apparent intention to proceed to install a new system, you have asked the City Attorney's Office to review SDCERS' recent legal assertions.

² Effective July 8, 2008, the Charter more clearly separated the City's internal auditing function from supervision of the Manager (Mayor) by creating the new office of City Auditor. The Manager (Mayor) appoints, with Council confirmation, the new Chief Financial Officer [CFO], who assumed the City's accounting responsibilities and oversees the City Treasurer. S.D. Charter § 39. All authority, power and responsibilities conferred upon the Auditor and Comptroller by the Charter are transferred to, assumed and carried out by the Chief Financial Officer. Due to these changes, this memo will substitute "CFO" in place of "Auditor and Comptroller" where appropriate.

³ As explained by the Comptroller's Office, the City now uses a certain fund (Fund 60011) to pay retiree checks and pay SDCERS employee payroll (including taxes and benefits), charged on a bi-weekly basis. SDCERS' operating/administration expenses paid via Data Processing are recorded in the fund; employee retirement contributions and any City "pickup" of employee retirement contributions are recorded in the fund. SDCERS has additional funds wired monthly to the City to cover its expenses, ranging from \$12 million to \$20 million monthly. SDCERS now proposes having employee contributions (and any City offset) wired to SDCERS on a periodic basis. SDCERS would process retiree payment and operational and administrative expenses against their own bank account. The City would continue to process SDCERS employee payroll. SDCERS would wire funds to cover employee payroll and benefits to City on a periodic basis. Finally, SDCERS will pay an administrative fee to the City for processing employee payroll.

QUESTION PRESENTED

May SDCERS operate its own general ledger system, directly pay system expenses, cut its own checks and open its own checking account?

SHORT ANSWER

Yes, but within certain parameters, and only if the City retains its ability to audit the system and control payments as required by the Charter. SDCERS may operate its own general ledger system and accounts to make retirement system payments, but the CFO must retain audit and monitoring functions of such accounts. The City must comply with Charter section 39, which states that the CFO “shall exercise supervision over all accounts” and that “[n]o contract, agreement or other obligation for the expenditure of public funds shall be entered into by any officer of the City” unless the CFO certifies its validity and that funds are sufficient to cover it.

Moreover, SDCERS, which is a City Department under the Municipal Code, cannot use the new system or accounts to pay its employees. It also may not be used to pay SDCERS’ expenses unless they are related to administration of the retirement fund, and accounts payable unrelated to administration of the system must remain under the City’s control.

SDCERS may operate its own system for limited purposes related to retirement funds in compliance with the California Constitution. We recommend, however, that the City and SDCERS confirm in writing the parameters of how the new system may be used and the controls to be retained by the City in order to comply with the City Charter.

ANALYSIS

Charter cities enjoy “autonomous rule over municipal affairs pursuant to article XI, section 5 of the California Constitution, ‘subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law.’ ” *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal. 4th 352, 363 (1999); *see Home Gardens Sanitary Dist. v. City of Corona*, 96 Cal. App. 4th 87, 93 (2002); 85 Ops. Cal. Atty. Gen. 211, 213-214 (2002). A retirement system established by a city for the benefit of its employees is a “public pension or retirement system” within the meaning of Article XVI of the Constitution. *See* 86 Ops. Cal. Atty. Gen. 86, 88 (2003); S.D. Charter, Article IX, §§ 141-149. Article XVI of the California Constitution gives the board of a retirement system “plenary authority and fiduciary responsibility for . . . administration of the system.” *See, Singh v. Board of Retirement*, 41 Cal. App. 4th 1180, 1183, 1191-1192 (1996). Article XVII(a) states that “the retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries.” Cal. Const. art. XVII(a).

To the extent that the City Charter prescribes how the pension system is to be administered, such directives may be followed only if they do not conflict with the state constitution's mandate and other preemptive state law.

The situation presented here is analogous to an issue raised in *Westly v. California Public Employees' Retirement System Board of Administration*, 105 Cal. App. 4th 1095 (2003), which considered the definition of a retirement board's "plenary authority." *Westly* analyzed the meaning of the provision of the California Pension Protection Act of 1992, which granted the Board of Administration of the California Public Employees' Retirement System [CalPERS] "plenary authority. . . for . . . administration of the system . . ." The CalPERS Board asserted it had plenary authority under the Act to exempt its employees from civil service, bypass the Controller's duty to issue warrants for payroll, and to issue stipends, salaries and other payments in excess of amounts permitted by the California Government Code. Based upon the CalPERS Board's belief it could operate with total autonomy of any other constitutional or statutory regulations to the contrary, the CalPERS Board took action to exempt its portfolio managers from civil service and to pay salaries exceeding amounts set by state law.

The State Controller challenged CalPERS' assertion of plenary authority. The court in *Westly* disagreed with CalPERS' autonomy argument, stating in relevant part:

We have concluded that the powers [in the Pension Protection Act of 1992] the voters intended to give the [CalPERS] Board **do not include the exclusive and unfettered authority over payments made to and on behalf of its members and employees.**

Westly, 105 Cal. App. 4th at 1113 (emphasis added). The court then granted the Controller's motion for judgment, and found that CalPERS could not exempt employees from civil service, bypass the Controller's duty to issue warrants for payroll, or issue stipends, salaries and other payments in excess of those set by state law. In other words, the Act **gave CalPERS "plenary authority" only over "administration of the system,"** which was limited by the court to the protection and delivery of the assets, benefits and services for which the Board has a fiduciary responsibility. The opinion stated that the voter intent was that the retirement board would have "the authority to administer the investments, payments, and other services of CalPERS, but not the compensation of the Board or the Board's employees." *Westly*, 105 Cal. App. 4th at 1112.

Applied here, this means that SDCERS has authority to administer retirement payments (including "delivery. . . of the benefits"), subject to the auditing and monitoring functions the City retains under its Charter, but SDCERS cannot use its own system to administer "compensation" of its employees. The City must continue to retain full control over those payments. The courts interpret the meaning of "administer retirement payments" narrowly. *Id.* at 1109-1113.

Our office previously opined, in relevant part:

The California Pension Protection Act of 1992 must be understood in the context of each existing retirement system and its concomitant legal structure. In the case of SDCERS, the Act has little effect because the Retirement Board had already been granted the power under the Charter to manage SDCERS and exclusive authority to administer and invest the Retirement Fund. The Auditor's role in issuing checks for benefits payments does not diminish the Retirement Board's authority or interfere with its performance. Rather, the Charter provisions mandating the Auditor's payroll function can be interpreted as a verification process intended to eliminate errors of fact and assist in the preservation of the Retirement Fund, and are thereby harmonized with the Act. Performance of this function by the Auditor does not transfer decision making authority from the Retirement Board to the Auditor, and does not violate the Act. Consequently, under mandates of the Charter, and absent serious performance problems by the Auditor, **the Auditor cannot be required by the Retirement Board to turn the benefits payroll functions over to SDCERS.**

1998 City Att'y MOL 348 (emphasis added).

This opinion remains accurate. SDCERS concedes that the City would need to delegate this ministerial function to it (see SDCERS opinion at p.1-2) in order to pay retirement benefits checks. But the question presented in the prior opinion was whether the Auditor and Comptroller would be **required** to cease performing the payroll function for payment of benefits by SDCERS if the Board requested it. The question presented here is whether SDCERS may make the retirement payments at all.

We believe it can, subject to the Charter mandates and controls detailed in this memorandum. First, if the City now wishes for SDCERS to begin processing retirement checks through its own system, the City may agree that SDCERS can perform that ministerial act under the holdings of *Westly*. *Westly* confirms that retirement boards have plenary authority over the administration of the system.⁴ However, we emphasize again, this holding is expressly limited to the actual administration of the retirement funds themselves. *Westly*, 105 Cal. App. 4th at 1113.

⁴ "Plenary" was defined in our prior opinion as "full, complete and absolute final decision-making authority within the boundaries of the grant of fiduciary authority." (August 28, 1998 MOL at 9, citing SACRS Prop. 162 Op. at 13-14; and *Black's Law Dictionary* 1154 (6th ed. 1990) (defining "plenary powers" as "Authority and power as broad as is required in a given case.").

Second, the Charter's clear mandate that the CFO retain auditing and monitoring abilities with regard to payments made by City Departments must be met. Charter section 39 confirms that the CFO must exercise supervision over all accounts "of all Departments of the City," perform oversight functions and must know the "exact financial condition of the City and of each Department, Division and office thereof." *Tirapelle v. Davis*, 20 Cal. App. 4th 1317 (1993), a case cited by SDCERS, similarly confirmed that the State Controller had a duty to audit claims against the Treasurer and to ensure those claims were authorized by law. However, the Controller was limited – the duty to audit claims to ensure expenses were authorized did not include the power to review and approve or reject the decisions of a department vested by the Legislature with authority over expenditures.⁵

Similarly, the CFO must retain the right to audit claims made against SDCERS and to ensure claims on the account are authorized by law; however, the CFO cannot reject decisions of the SDCERS' Board of Administration as to administration of the fund. We strongly recommend that the City and SDCERS document their understanding of how the auditing and monitoring abilities will be met if SDCERS is going to take on the role of cutting the checks for retirement benefits.

Third, as emphasized by the *Westly* opinion, the City must retain full control over payment of "the compensation of the Board or the Board's employees." *Westly*, 105 Cal. App. 4th at 1112. Thus, all payroll functions for City employees who work for SDCERS must remain with the City under the CFO's oversight.

Fourth, we interpret the Charter and the *Westly* opinion to preclude SDCERS from paying office expenses and other expenses of the Department that are outside of the "administration" of the retirement system. Charter section 39 states in relevant part that,

No contract, agreement, or other obligation for the expenditure of public funds shall be entered into by any officer of the City and no such contract shall be valid unless the Chief Financial Officer shall

⁵ In *Westly*, an appellate court deemed CalPERS funds to be state funds. *Westly*, 105 Cal. App. 4th at 1116. Similarly, SDCERS funds are City funds. Charter section 145 states:

All moneys contributed by employees of the City or appropriated by the Council or received from any other source under the terms of this Article, shall be placed in a special fund in the City Treasury to be known as the City Employees' Retirement Fund . . . to be held and used only for the purpose of carrying out the provisions of this Article. No payments shall be made therefrom except upon the order of the Board of Administration.

S.D. Charter § 145. Retirement benefits are contractual obligations of the City. If the SDCERS fund is insufficient to pay benefits owed to City employees, the City would be obligated to make those payments to retirees. The City thus is obligated to ensure that payments from the fund are provided in accordance with the Charter.

certify in writing that there has been made an appropriation to cover the expenditure and that there remains a sufficient balance to meet the demand thereof.

Finally, City Attorney Opinion No. 92-2 recognized that the process of selecting a bank to serve as custodian of the Retirement Fund is one of SDCERS' most important fiduciary responsibilities associated with administration and investment of the trust. *See* MOL 92-2. In practice, SDCERS has, without any objection by the City, placed the City Retirement Funds with a custodial bank chosen by SDCERS. This memorandum does not address that practice. Here again, we stress that the Charter-mandated authority to audit the accounts must be respected.

CONCLUSION

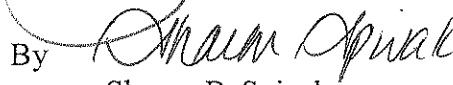
The importance of the City's duty to comply with the Charter and provide oversight to the City's retirement system through auditing and monitoring payments cannot be overstated here. Although this office recognizes that SDCERS may set up its own general ledger system for the functions detailed above (i.e., to administer retirement payments, including "delivery . . . of the benefits" and to administer the system), we cannot state strongly enough how critical it is for the City to have a solid understanding of the parameters of what SDCERS may do with a separate system. We interpret *Westly* to stand for the premise that SDCERS cannot use its own system to administer "compensation" of its employees, who are employees of the City of San Diego. Moreover, SDCERS cannot use the system to pay accounts payable unrelated to its administration of the system. If a system is to be set up for SDCERS' exclusive use, the City must ensure that appropriate controls and auditing functions are in place.

JAN I. GOLDSMITH, City Attorney

By


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By


Sharon B. Spivak
Deputy City Attorney

SBS:amt

Enclosures

ML-2009-3

cc: Jay M. Goldstone, Chief Operating Officer
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MEMORANDUM OF LAW

DATE: August 28, 1998

TO: Ed Ryan, Auditor and Comptroller

FROM: City Attorney

SUBJECT: Use of the Auditor's and Comptroller's Services by the San Diego City Employees' Retirement System

QUESTION PRESENTED

Would the Auditor and Comptroller for the City of San Diego [the Auditor] be required to cease performing the payroll function for payment of benefits by the San Diego City Employees' Retirement System [SDCERS] if requested to do so by the Board of Administration [Retirement Board]?

SHORT ANSWER

No. Under the San Diego Charter, the Auditor is responsible for issuing checks on behalf of SDCERS for payment of retirement benefits. These functions are not changed by the California Pension Protection Act of 1992 [Act] because the Auditor's benefits payroll functions serve to verify the accuracy of claims made on the Retirement Fund and are essentially ministerial acts. The Retirement Board continues to hold the ultimate authority and responsibility to determine what draws shall be made on the Retirement Fund, to whom they will be paid, and in what amounts.

DISCUSSION

I. Introduction

SDCERS was established by the City pursuant to its Charter and is subject to the Charter and the San Diego Municipal Code [SDMC]. Compared to other public employee retirement systems, SDCERS was created as a relatively independent retirement system.¹ The system is managed by the Retirement Board. The Retirement Board has exclusive control over the administration and investment of retirement funds, sole authority to determine the conditions under which persons may be admitted to benefits under the system, and the prerogative to establish rules and regulations for the system. Charter § 144. The Charter mandates that all money contributed to the system be placed in the City Treasury, in a special trust fund, the Retirement Fund, separate from all other City funds. Charter § 145. Likewise, under the Municipal Code, the Retirement Board prepares its own budget and pays for its administrative costs with undistributed earnings generated by the Retirement Fund. SDMC § 24.0906. The Board may retain an actuary and independent investment counsel. SDMC § 24.0901.

Still, as an entity that exists by virtue of the City's Charter for the benefit of the City's employees, SDCERS is very much connected to and part of the City's government. For example, as mandated by Charter section 144, the Retirement Board includes members drawn from different sectors of the City government (the City Manager, the City Auditor and Comptroller, the City Treasurer), its employees (active employees, retired employees, and safety employees), and City Council appointees (a bank officer and three citizens of the City).² The Retirement Fund is a special fund placed in the City Treasury. Charter § 145. The Board's classified employees are part of the City's Civil Service system. Charter § 144. Further, while the Retirement Board has the authority to determine the conditions under which persons may be admitted to retirement benefits, the Board makes that determination "under such general ordinances as may be adopted

¹For example, for county retirement boards that are governed by Government Code section 31580, the administrative budget is prepared by the county treasurer and approved by the county's board of supervisors. This arrangement reflects the historical position of the retirement system as part of the county treasurer's office. *See* the legal opinion prepared by Joseph L. Wyatt and Michael V. Toumanoff of Hufstedler, Kaus & Ettinger for the State Association of County Retirement Systems, et al., regarding the Act, dated July 3, 1993, at 36 [SACRS Prop. 162 Op.].

²The purpose of this composition "is to secure a board as objective, fair and competent as possible through the representation of all those interests necessarily involved within a public service retirement system." *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 39 (1979).

by the Council." Charter § 144. The Charter also empowers the City Council to enact the necessary ordinances to carry out the terms of the Charter with respect to the retirement system. Charter § 146; *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 39 (1979).

In addition to sitting on the Retirement Board, the Auditor is responsible under the Charter for performing payroll and auditing functions for SDCERS. Charter §§ 39, 82, 83, 144, 148; SDMC § 24.0907. Since the inception of SDCERS, the Auditor has handled these functions for SDCERS. The Retirement Administrator has recently expressed a desire to operate the retirement benefits payroll independent of the Auditor and will be bringing this issue before the Retirement Board for its consideration.

The California Pension Protection Act of 1992 (also known as Proposition 162), a statewide ballot initiative, was approved by California voters on November 3, 1992.³ The Act amended article XVI, section 17 of the California Constitution. Since its passage, this Office has written one legal opinion and two memoranda regarding the effect of the Act on the administering boards for the City's benefit plans. 1992 Op. City Att'y 9; 1993 City Att'y MOL 692; City Att'y MOL No. 98-7 (Feb. 2, 1998). In addressing the issues presented in this memorandum, we reiterate the words of caution written in the first opinion issued by the City Attorney regarding the Act:

As long as the Retirement System operates efficiently, the legal nuances of Charter power allocation between the Board and the Council may seem inconsequential. Nothing could be further from the truth. The Retirement Fund is presently valued at close to 1.2 billion dollars and millions of dollars are paid into and out of the Fund each year.⁴ As illustrated by the cases cited throughout this memorandum, a seemingly innocuous action by the Board or the Council can be transformed into a problem of enormous magnitude with disastrous results.

1992 Op. City Att'y at 23 (footnote added).

This Office has previously opined that the Act applies to SDCERS. *See* 1992 Op. City Att'y 9; 1993 City Att'y MOL 692; *see also* City Att'y MOL No. 98-7. As discussed in the prior

³The language of the Act is attached as Appendix A.

⁴As of July 9, 1998, the Retirement Fund was valued at over \$2.1 billion.

opinions, the Act does not simply supplant local laws existing at the time of its passage; depending on the degree of conflict between the existing local law and the Act, the Act may supersede local law, may be harmonized with local law, or may not address and therefore not affect a matter addressed by local law. In this instance, as the Act generally addresses administration of retirement systems while local law specifically addresses the role of the Auditor within that system, we must carefully consider whether the Act alters the relationship between the Auditor and the Retirement Board in regard to the Auditor's benefits payroll functions, and if so, to what extent.

II. Prior City Attorney Opinions Establish A Standard For Evaluating the Effect of the Act on Charter and Municipal Code Sections Relating to SDCERS

San Diego is a charter city; it was established under a charter, and that charter is the supreme law of the City. As such, the City's power to make and enforce ordinances and regulations regarding municipal affairs is "subject only to the restrictions and limitations imposed by the city charter, as well as conflicting provisions in the United States and California Constitutions and preemptive state law." *Grimm*, 94 Cal. App. 3d at 37.

Under article XI, section 5, subdivision (b) of the California Constitution, charter cities have "plenary authority" over compensation paid to their employees. Retirement systems are considered matters of local concern within the purview of local law, because they are part of the compensation of a charter city's employees. *Grimm*, 94 Cal. App. 3d at 37; *Sonoma County Org. of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 315-17 (1979). Generally, passage of a state law addressing a matter of local concern will not affect charter cities. *Sonoma*, 23 Cal. 3d at 315-17. The Act, however, not only amended the California Constitution, it included language providing for its application "notwithstanding any other provision of law or this Constitution to the contrary."

As stated in the first legal opinion written by this Office discussing the Act, the Act "elevates the specific subject matter contained within it from a matter previously considered purely a 'municipal affair' under the 'home rule doctrine,'" as discussed in *Grimm*, 94 Cal. App. 3d at 37, "to a subject matter of statewide concern," requiring the Retirement Board and Council to harmonize local laws with the Act. 1992 Op. City Att'y at 10-11. However, if a matter that relates to the retirement system is not addressed by the Act, it remains a municipal affair, subject to local laws, rules and regulations. *Id.* at 11.

A. City Attorney Opinion No. 92-2 (December 17, 1992)

Opinion 92-2 addressed two issues: first, whether the Board must obtain Council authorization to hire a bank or consultant; and second, whether the Board must follow Council Policies and Administrative Regulations to hire a bank to serve as custodian of the Retirement Fund or to retain consulting services. In response, we opined that the Board may contract with the bank of its choice to serve as custodian of the Retirement Fund, without approval of Council, because that function falls squarely within the duties of the Board as set forth in the Charter and the Act. 1992 Op. City Att'y 9, 21. Our opinion as to the hiring of a consultant was more qualified, because the hiring of consultants is addressed by a Council Policy and an Administrative Regulation. Harmonizing these provisions with the Act, we concluded that "the answer depends upon the nature of the services provided by the consultant."

If the services relate to a project or subject matter within the purview of power granted by the Charter to Council, then yes, Council Policy must be followed. On the other hand, if the services relate to a project or subject matter within the scope of power granted by the Charter or the Act to the Board, the Board is not required to follow Council policies in selecting a consultant.

Id. Thus, if the Retirement Board sought to retain a consultant to analyze the conditions under which persons should receive retirement benefits, then the Board must follow the City's policy and regulation because that matter remains a matter of local concern. *Id.* at 21-22.

B. 1993 City Attorney Memorandum of Law 692 (December 15, 1993)

A year later, in a Memorandum of Law dated December 15, 1993, this Office addressed the issues of the Retirement Board's authority to set salaries for SDCERS' unclassified staff, and to increase the salaries of the Assistant Administrator and Administrator. In that Memorandum, this Office concluded that existing local law set forth in the City's annual salary ordinance and the Charter governed as long as those provisions did not unreasonably impair the Board's ability to meet its fiduciary obligations.

In our view, the plenary authority given to the Board to administer the system includes the ultimate authority to set and revise compensation levels for those employees not subject to the Civil Service provisions of the Charter. To this extent, the procedures set forth in the annual salary ordinance govern. With respect to those classified employees covered by the City's Civil

Service provisions, we note that, *absent any showing that the application of those provisions unreasonably curtails or impairs the Board's ability to fulfill its constitutionally mandated fiduciary duties (such as the duty to deliver benefits promptly), those rules should stand and govern accordingly.*

1993 City Att'y MOL 692, 694 (emphasis added). Accordingly, the salary increase approved by the Board for the Administrator was acceptable because it fell within the range provided by the salary ordinance. The Board did not, however, have the authority to implement the salary increase retroactively. *Id.* at 694-95. The salary increase requested by the Administrator, as department head, for the Assistant Administrator, was also within the range provided by the salary ordinance and was acceptable without further action by Council. *Id.* at 695-96.

C. City Attorney Memorandum of Law Number 98-7 (February 2, 1998)

This Office recently published City Attorney Memorandum of Law Number 98-7, dated February 2, 1998, opining that the Act applies to the City's Defined Contribution Plans Trustee Board [Trustee Board]. City Att'y MOL No. 98-7 at 27. In that Memorandum, we further described the relationship between the Act and existing local law.

[A]ny existing statute, charter provision, or public agency procedure that usurps or transfers ultimate authority over administration of a public retirement or pension system away from the board that governs that system would be unconstitutional pursuant to this section. *Statutes that do not usurp or transfer a board's ultimate authority to decide administrative issues remain permissible, provided that their application does not unduly interfere with the constitutional fiduciary duties imposed exclusively upon retirement boards.* Moreover, any decision by a board to use its plenary authority to depart from a permitted statutory administrative scheme must be exercised in conformance with the overriding fiduciary duties imposed on the board by the Constitution.

City Att'y MOL No. 98-7 at 20-21 (emphasis added). Applying the Act to the Trustee Board, this Office found that the Act heightened the Trustee Board's fiduciary responsibilities above those provided in the Master Trust Agreement, rendering unconstitutional a provision in the Agreement that would have allowed the Trustee Board to delegate fiduciary responsibility to the City. *Id.* at 29.

This Memorandum also addressed the role of the Auditor in relation to the payment of the Trustee Board's administrative expenses and determined that the Auditor's function is not changed by the Act. *Id.* at 30-31. Further, the Act does not give the Trustee Board the authority to amend plan documents or to determine the level of benefits to be provided by the defined contribution plans. *Id.* at 32-33. Under the Act, the Trustee Board need not obtain the City's approval to hire a consultant as long as the contracted services pertain to an area of the Trustee Board's exclusive authority. *Id.* at 33-34. Specifically, the Trustee Board can contract for investment consultant services without the approval of the City because the Trustee Board has exclusive authority to manage and invest the Trust Fund assets. *Id.* The Trustee Board is not required to follow City policies and regulations for selection and approval of such a consultant. *Id.* at 35.

D. A Test for Application of the Act to Local Law

In each of the City Attorney's opinions, essentially the same test is used to determine whether the local law, policy or regulation in question is superseded by or can be harmonized with the Act. That test is: (1) is the subject matter of the local law or rule covered by the Act, i.e., does the subject matter directly relate to administration of a retirement system or to investment or administration of a retirement fund? If not, then the local law or rule must be followed. If so, then (2) does the local law or rule usurp or transfer the Retirement Board's ultimate decision-making authority, or unreasonably impair or interfere with the Retirement Board's ability to meet its fiduciary obligations? In answering the second question, we look to the rules of interpretation and determine whether the local rule can or should be harmonized with the Act to avoid its demise. Finally, (3) is departure from the local law or rule consistent with the Retirement Board's fiduciary duties? With this test in mind, we turn to the specific question you have asked.

III. Application of the Act to Charter and Municipal Code Sections Relating to the Auditor's Benefits Payroll Functions

A. The Auditor's Role as Mandated by the Charter and Municipal Code

The office of the Auditor and Comptroller for the City of San Diego is created in section 39 of the Charter. Pursuant to that section, the Auditor is elected by Council and serves as the chief fiscal officer for the City. The Auditor supervises all accounts and reports to the City Manager and Council on the financial condition "of each Department, Division and office" of the

City.⁵ Charter § 39. Sections 80 through 84 of the Charter establish procedures for the payment of the City's expenses while safeguarding the financial security of the City Treasury. Section 82 of the Charter prescribes the Auditor's duties in detail.

The Auditor and Comptroller shall examine all payrolls, bills, and other claims and demands, except claims for damages against the City, and shall issue no warrant or check-warrant for payment unless he finds that the claim is in proper form, correctly computed, and duly approved; that it is legally due and payable; that an appropriation has been made therefor which has not been exhausted; and that there is money in the treasury to make payment. He may investigate a claim . . . and if he finds a claim to be fraudulent, erroneous or otherwise invalid, he shall not issue a warrant or check-warrant therefor.

Section 83 of the Charter ensures that all requests for payment are made through the Auditor, and not paid unless approved by the Auditor. Charter section 126 mandates the handling of payrolls for the classified or unclassified service by the Auditor. Although Municipal Code section 24.0901 allows the Retirement Board to retain an actuary and independent investment counsel, neither the Code nor the Charter makes the same provision for an auditor.

These sections delineating the duties of the Auditor are consistent with the language of Charter section 144 governing the Retirement Board, and reflect the intent that SDCERS use the City's Auditor for its payroll functions. Indeed, since the inception of SDCERS, the Auditor has, in fact, handled the retirement benefits payroll for SDCERS in accordance with the Charter.

⁵ SDCERS is a "department, division or office" of the City within the meaning of the Charter. Such an interpretation is both historically and contextually consistent. For example, SDCERS employees are part of the City's Civil Service system and participate in the City's employee benefit plans, SDCERS' accounts are part of the City Treasury, and the Auditor handles SDCERS' employee, expense and benefits payrolls. As stated by the Court in *Board of Retirement v. Santa Barbara County Grand Jury*, 58 Cal. App. 4th 1185, 1195 (1997), in rejecting that Board's argument that it was not a "county or a district" within the meaning of the statute at issue, any other interpretation would be an absurd reading of the statutory scheme that defies common sense and could lead to mischief.

B. The Act's Effect on the Auditor's Role

Our previous opinions discuss the legislative history and language of the Act at length. *See* 1992 Op. City Att'y at 16-20; City Att'y MOL No. 98-7 at 18-31. Those discussions will not be repeated here. Nevertheless, it is important for the purpose of this analysis to revisit some of the pertinent language and legislative history of the Act.

The Act (Proposition 162) was written largely in response to actions taken by the California State Legislature against the retirement system for state employees, the California Public Employees Retirement System [CalPERS]. The analysis by the Legislative Analyst included in the ballot specifically referred to the Legislature's action transferring the actuarial function from the CalPERS Board to an actuary appointed by the Governor and confirmed by the Legislature, and the use of CalPERS assets to offset employer contributions.⁶ Thus, the ballot arguments for Proposition 162 refer to "raids on pension funds."

The Act sought to eliminate such "political interference" by separating retirement boards from legislative control, especially control over the use of retirement funds. To do so, the Act amended article XVI, section 17 of the California Constitution to give more independence and greater fiduciary responsibilities to public retirement boards. The Act does that in three primary ways. First, the Act gives retirement boards "plenary authority and fiduciary responsibility" for investment of retirement funds *and* administration of the retirement system. Second, the Act clarifies the fiduciary responsibilities accompanying the increased independence. The Act provides that boards have the "sole and exclusive fiduciary responsibility over the assets" and the "sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits" to participants and beneficiaries. Third, while maintaining the duties of retirement boards to minimize employer contributions and pay only reasonable costs of administration, the Act mandates that the primary duty of a retirement board is to its participants and beneficiaries.

The issue of the Auditor's involvement with SDCERS implicates that part of the Act giving retirement boards "plenary authority" for administration of the retirement system as well as investment of retirement funds. "Plenary authority" means "full, complete and absolute final-decision-making authority within the boundaries of the grant of fiduciary authority." SACRS

⁶ For a more detailed discussion of the events leading up to Proposition 162, *see* Robert F. Carlson, CalPERS Senior Board Member, Address at the *Pensions 2000* Conference (July 22, 1997) (transcript reprinted in the *CSEA Voice*, October 17, 1997); *see also*, Cal. Senate Office of Res., S. Pub. No. 643-S, *Analysis of November 1992 Ballot Propositions; Proposition 162*.

Prop. 162 Op. at 13-14; *see Black's Law Dictionary* 1154 (6th ed. 1990) (defining "plenary powers" as "Authority and power as broad as is required in a given case."). "Administration" means management of the retirement system for the purposes set forth in the Act. SACRS Prop. 162 Op. at 14; *see American Heritage Dictionary of the English Language* 23 (3d ed. 1972) (defining administration as "Management of an institution, public or private.") and *Black's Law Dictionary* 44 (6th ed. 1990) ("In public law, the administration of government means the practical management and direction of the executive department . . .").

These provisions of the Act already existed in section 144 of the Charter before the Act was placed on the ballot. *See* 1992 Op. City Att'y at 12. Charter section 144 provides that SDCERS "shall be managed by" the Retirement Board. That section further states that the Retirement Board "shall have exclusive control of the administration and investment of" the Retirement Fund. Thus, in the case of SDCERS, where the mandated structure is in harmony with the language and intent of the Act, the Act "should have little or no practical impact on the way the Retirement System currently operates." 1992 Op. City Att'y at 12.

C. Must the Auditor Perform the Payroll Function for Payment of Benefits?

As discussed above, this Office has opined that the Auditor's role in writing checks for administrative expenses, as set forth in Charter sections 39 and 80 through 84, does not violate the Act because it is simply a verification procedure. City Att'y MOL No. 98-7 at 30-31. Likewise, the Auditor's role in issuing checks for the payment of benefits is to verify that the payment was properly authorized by the Board, is due and payable, and that money, appropriated for that purpose, exists in the City Treasury (in this case, the Retirement Fund in the Treasury) to pay the claim. *Id.* at 31; Charter § 82.

The Auditor does not determine what expenses should be paid, in what amounts, or for what purpose. Rather, the Auditor serves as a gatekeeper to the City Treasury of which the Retirement Fund is a part. By monitoring deposits to and disbursements from the Treasury, the Auditor knows and is able to report the condition of the Treasury. Thus, the Auditor's role in issuing checks is not a decision-making or management function but a ministerial act designed to ensure the solvency of the City and its departments, as well as the accuracy of the claims payments. As such, this function of the Auditor does not usurp, interfere with, or transfer the Retirement Board's ultimate management authority.

Further, we have no facts before us that indicate that the performance of this function by the City's Auditor rather than an outside auditor or someone under the direct supervision of the SDCERS' Administrator hinders the Retirement Board in the performance of its management or fiduciary duties. Retirement checks are issued based on information provided to the Auditor from

SDCERS, and have always been issued in a timely manner. Use of the City Auditor for this function creates a second line of defense against error, results in lower administrative costs, and helps ensure that a public system remains open and public.⁷ For example, the Auditor's office has in the past, in the process of verifying that a check for the payment of benefits is in the correct amount, discovered that the salary figure used to calculate the retirement benefits was incorrect, and would have resulted in an overpayment. Once the error was brought to the attention of the SDCERS' staff, it was corrected.

While this verification process involves the Auditor, it does not change the fact that under the Act, the Retirement Board has the ultimate authority and bears the ultimate responsibility for delivering benefits. Therefore, to the extent that Charter sections 80 through 84 impose liability on the Auditor for mis-paid checks, in those instances where the Auditor has relied on information or directions provided by SDCERS resulting in the mis-payment, those provisions are an unconstitutional infringement on the fiduciary obligations of the Retirement Board under the Act. The Retirement Board decides, within the confines of the law, whether to pay benefits, and the Retirement Board is responsible for those decisions. Under the Act, a Charter provision transferring liability from the Retirement Board to the Auditor is unconstitutional. *See* City Att'y MOL No. 98-7 at 29 (Trustee Board may not delegate a fiduciary responsibility to City).

One argument against using the Auditor to perform the benefits payroll function is that the Auditor's duties to other City departments could potentially interfere with or delay the transmission of the retirement allowances to retired employees, in which case the Retirement Board would need to take action to fulfill its fiduciary obligations. However, *if* such a situation arose where the Auditor's Office was not performing its duties as mandated by the Charter, and *if* that delay or negligence unduly interfered with the Retirement Board's ability to meet its fiduciary obligations, the Auditor's Office could be compelled to undertake its duties so that the Retirement Board's fiduciary obligations are met. This situation is no different than if an outside auditor refused to perform duties; in either case, the Retirement Board could compel performance.

⁷ SDCERS, a retirement system established by a public entity for the benefit of public employees, is subject to public scrutiny. Under the Brown Act and the California Public Records Act, that scrutiny takes the form of public Retirement Board meetings and reports. Cal. Gov't Code §§ 54950 and 6251; *see* City Att'y MOL No. 98-7 at 31. Under the Charter, that scrutiny is further evident in, *inter alia*, the Auditor's reports to the Manager and City Council regarding the revenues and expenses of the retirement system.

In the meantime, the Act cannot be interpreted and local laws cannot be negated based on hypothetical possibilities. Repeals by implication are not favored and will not be recognized unless two apparently conflicting laws cannot be harmonized. *Singh v. Retirement Board*, 41 Cal. App. 4th 1180, 1190 (1996). Laws "should be interpreted in such a way as to make them consistent with each other, rather than obviate one another." *Id. quoting Nickelsberg v. Workers' Comp. Appeals Bd.*, 54 Cal. 3d 288, 298 (1991).⁸ Interpretations which "might lead to mischief or absurdity" should be avoided. *Board of Retirement v. Santa Barbara Co. Grand Jury*, 58 Cal. App. 4th 1185, 1189 (1997).⁹

Under the Act, the Retirement Board has the sole and exclusive responsibility to administer SDCERS in a manner that will ensure the prompt delivery of benefits and services to members and their beneficiaries. Absent any showing that application of Charter sections 80 through 84 unreasonably impairs the prompt delivery of benefits, the mandates in these Charter sections are not negated by the Act, they apply to SDCERS, and they must be followed. 1993 City Att'y MOL at 694.

CONCLUSION

The California Pension Protection Act of 1992 must be understood in the context of each existing retirement system and its concomitant legal structure. In the case of SDCERS, the Act has little effect because the Retirement Board had already been granted the power under the Charter to manage SDCERS and exclusive authority to administer and invest the Retirement Fund. The Auditor's role in issuing checks for benefits payments does not diminish the Retirement Board's authority or interfere with its performance. Rather, the Charter provisions mandating the Auditor's payroll function can be interpreted as a verification process intended to eliminate errors of fact and assist in the preservation of the Retirement Fund, and are thereby harmonized with the Act. Performance of this function by the Auditor does not transfer decision-

⁸ In *Singh v. Retirement Board*, the retirement board for the Imperial County Employees' Retirement System challenged the court's ability to review its decision to deny a disability retirement in light of the "plenary authority" granted in the Act. The court concluded that although "it is possible" to read the Act as immunizing the retirement board's decisions from judicial review, "such a reading of the statute would lead . . . to absurd results" contrary to the intent of the Legislature. 41 Cal. App. 4th at 1192.

⁹ In *Board of Retirement v. Santa Barbara*, the court held that the plenary authority afforded by the Act did not preclude the County Grand Jury from investigating complaints about delays in processing applications for disability retirements. 58 Cal. App. 4th at 1193.

Ed Ryan, Auditor and Comptroller

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August 28, 1998

making authority from the Retirement Board to the Auditor, and does not violate the Act. Consequently, under the mandates of the Charter, and absent serious performance problems by the Auditor, the Auditor cannot be required by the Retirement Board to turn the benefits payroll functions over to SDCERS.

CASEY GWINN, City Attorney

By 

Carrie L. Gleeson
Deputy City Attorney

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**SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM
STAFF REPORT
LEGAL DIVISION**

FOR PUBLIC DISTRIBUTION

DATE: January 12, 2009
TO: Mark Hovey, Chief Financial Officer
FROM: Elaine Reagan, General Counsel
SUBJECT: SDCERS Independence – General Ledger System

ISSUES AND BRIEF ANSWERS

ISSUE NO. 1: May SDCERS operate its own General Ledger System, including payment of SDCERS expenses through that system, independently from the City Auditor and Comptroller's Office?¹

BRIEF ANSWER: Yes. SDCERS is an independent entity from the City. The Board of Administration has plenary authority over the administration of the system which would include the authority to operate a General Ledger System separate from the City and to open accounts from which SDCERS could make direct payment of system expenses.

ISSUE NO. 2: May SDCERS control reimbursement of system expenses by cutting its own checks in lieu of the City Auditor and Comptroller/Treasurer?

BRIEF ANSWER: Yes. Ministerial acts of a public official may be delegated. The Auditor has the right to audit payments of SDCERS checks but does not have discretion to refuse to issue checks for payment of SDCERS' expenses as the authority to determine and approve expenses of SDCERS lies solely with the Board. As the Auditor has no

¹ The Charter refers to the Auditor and Comptroller's office. Currently, the checks are actually processed by the Comptroller's office although the Charter language still references the "Auditor and Comptroller." For ease of reference, this memo will simply refer to the "Comptroller" which means the Auditor and Comptroller's office as delineated in the City Charter.

discretion to refuse to make such payments, his or her act in issuing checks is purely ministerial in nature and may be delegated to SDCERS.

ISSUE NO. 3: May SDCERS open its own checking account or does the City Charter provide that only the City Treasurer may open checking accounts?

BRIEF ANSWER: Yes. City Charter Section 45 provides that the Treasurer determines depositories for City Funds. However, as Retirement Fund monies are trust assets and not part of City Funds, the Charter does not give the Treasurer exclusive power over choice of depositories for Retirement funds as delineated in City Charter Section 145.

RELEVANT FACTS

Retirement Fund monies and investment earnings are no longer maintained in the City treasury but are maintained in SDCERS' custodial bank, State Street. Once a month, State Street transfers sufficient monies to the City's bank account for payment of monthly benefits to SDCERS' participants and beneficiaries.

Wire transfer requests must be coordinated with the City Treasurer, which follows a different chain of command and prioritizes SDCERS work with that of other City Departments leading to a slower response to SDCERS' requests than would occur if the transfers were handled only by SDCERS' personnel. Because bank account reconciliations are handled by the City, SDCERS does not know of open, uncleared disbursements and is unable to provide outside auditors with clean bank reconciliations for disbursements originating from SDCERS. Further, because SDCERS has no control over the checking account or check-writing authority, SDCERS has no means to issue same-day manual checks in emergency situations resulting in delayed payments where manual checks are necessary.

The City is currently converting its 30 year old general ledger system to an SAP financial software package that is overly complicated for SDCERS' purposes. The City currently plans to "go live" with this new financial system in July of 2009 and will charge SDCERS approximately \$136,000 in FY 09 and a similar amount in every following year, for SDCERS' "share" of the cost of the system. SDCERS can acquire, configure and install its own General Ledger system for a total cost of less than \$500,000. The SAP system is not appropriate for the accounting and financial reporting in the prescribed format for public retirement systems.

The General Ledger system SDCERS proposes to install is more efficient and cost effective for SDCERS' purposes and will provide a higher degree of customer service and prompt attention to system issues, including financial reporting, than the SAP system as the City will be unable to customize their system to meet the specialized requirements of a public pension system. SDCERS proposes to use the Microsoft Dynamics GP system which is able to integrate and interface to the SDCERS pension benefits

administration system, Pension Gold, while the City's SAP ERP system cannot do so. The lack of integration between SDCERS accounting and financial reporting processes and both the City's current and future systems exposes SDCERS to an increased risk of failing to accomplish timely and accurate financial reporting and increases both the time and cost to perform annual independent financial audits. All the City processes for general ledger, journal entries, year-end closes, financial calendar cut-offs, are designed for the City's benefit with SDCERS having little say in that process. For example, the City's fiscal calendar is 13 four-week periods preventing SDCERS from having a general ledger close at the end of each calendar month from which financial statements can be prepared. Rather, SDCERS must print off trial balances at the end of the month and manually create financial statements via Excel that are not tied to a GL close. This is a loose process that's only trued-up at the year-end and not consistent with best practices for financial reporting purposes.

The City's fixed asset process is updated once a year and is months behind in processing capital asset spending into the fixed asset system. SDCERS has no visibility to fixed asset purchases and depreciation expense other than once a year. Instead, the City process is initially to expense capital asset purchases and later reclassify them to the balance sheet after year-end, a process that requires SDCERS to manually adjust City GL data to meet our needs, thus decreasing efficiency and increasing costs to SDCERS. The City capitalizes spending on assets only if it exceeds \$5,000 per individual asset, a materiality threshold that may make sense for the \$2 billion City budget, but not so for SDCERS' \$40 million budget.

Both the City's current and new SAP system cannot account for the unique type of accounts receivable owed by SDCERS' members for lump sum and installment contributions for purchases of service credit.

The City's processes for processing an invoice payment are cumbersome and inefficient, resulting in delay for payments of operating expenses with the result that SDCERS' vendors have, on occasion, refused to provide service to SDCERS until the City "pays its bill." SDCERS' proposed General Ledger system, tied to SDCERS' own bank account, will allow SDCERS to process invoices more efficiently and with less administrative expense involved.

In an Auditor report dated April 8, 2008 responding to Kroll remediation recommendations for the City's bank reconciliation process, both the City Treasurer and City Internal Auditor recommended segregation of SDCERS' accounts and banking transactions from the City's to improve the accountability and timeliness of SDCERS' and the City's reconciliation processes.

SDCERS has determined that its fiduciary responsibilities to its members for both prompt payment of benefits, system operating expenses and financial reporting require it to obtain a General Ledger System designed for its needs which must be integrated with SDCERS' ability to write its own checks and reconcile its own checking accounts.

Without the ability to have its own checking account, the efficiency of the new General Ledger system would be significantly compromised.

SDCERS does not intend to prevent the City Auditor from exercising his or her power to audit SDCERS' records to ensure compliance with the plan or any applicable local laws or regulations.

ANALYSIS

ISSUE NO. 1:

May SDCERS operate its own General Ledger System, including payment of SDCERS expenses through that system, independently from the City Comptroller's Office?

ANALYSIS:

San Diego is a charter city established under a charter which is the supreme law of the City. The City's power to make and enforce ordinances and regulations regarding municipal affairs is "subject only to the restrictions and limitations imposed by the city charter, as well as conflicting provisions in the United States and California constitutions and preemptive state law." *Grimm v. City of San Diego*, (1979) 94 Cal.App.3d 33, 37. A charter city remains subject to and controlled by general state laws involving a "matter of statewide concern." Any fair and reasonable doubt as to whether state preemption applies is resolved in favor of the legislative authority of the state. *Cox Cable San Diego v. City of San Diego*, (1987) 188 Cal.App.3d 952, 961-962.

While local laws should be harmonized to avoid a finding of unconstitutionality [*Montgomery v. Board of Administration*, (1939) 34 Cal.App.2d 514, 520-21], if the local laws usurp or interfere with the Board's ability to carry out its fiduciary duties, they will violate the tenants of Art. 16, §17 of the California Constitution.

Art. 16, §17 of the California Constitution provides that the assets of a public pension system are trust funds to be held for the exclusive purpose of providing benefits to participants and defraying reasonable expenses of administering the system. It also states that the retirement board has the *sole and exclusive* fiduciary responsibility over the assets of the system and that the board has plenary authority and the *sole and exclusive* responsibility for administering the system to ensure prompt delivery of benefits and related services to participants.

The San Diego City Charter provides that the Board shall have *exclusive control* of the administration and investment of the fund "provided, however, that the Auditor and Comptroller shall refuse to allow any warrant drawn for payment of a retirement allowance if, in the opinion of the Auditor and Comptroller, such retirement allowance

has been granted in contravention of this Article or any ordinances passed under the authority granted herein.” [City Charter §144]

Section 39 of the Charter provides that the Chief Financial Officer (CFO) shall exercise control over all accounts and show the financial transactions of all Departments of the City. The CFO is responsible for oversight of the City’s financial management and treasury. This section, last amended in June of 2008, also provides that the authority, power and responsibilities conferred upon the Auditor and Comptroller are transferred to, assumed and carried out by the City’s CFO.

While the Charter provides that the Auditor/Comptroller may refuse to issue a warrant for payment of retirement benefits,² given the Board’s plenary authority over the administration of the system and the Board’s sole and exclusive right to judge the conditions under which benefits are granted, this provision of the Charter is unconstitutional in that it infringes on the Board’s exclusive and plenary authority.

Here, the California Constitution gives a public retirement board sole and exclusive authority of the assets of the system for purposes of ensuring prompt payment of benefits, defraying of system expenses and prompt delivery of related services. The City’s operation of its current general ledger system, as well as the new general ledger system, hinders and prevents SDCERS from promptly paying its operating expenses and preparing its financial reports on a timely and efficient basis. In addition, requiring SDCERS to continue to use the City’s GL system and the City’s checking accounts increases SDCERS’ operating expenses and creates inefficiency in its administration.

On August 28, 1998, the City Attorney’s office issued a Memorandum of Law written by Assistant City Attorney Carrie L. Gleeson. In that Memorandum, Assistant City Attorney Gleeson opined that the issuance of checks was a ministerial act, the Auditor did not have the power to refuse to issue a warrant (despite contrary Charter language), the Comptroller’s office served only as a “verification check” to avoid errors on the part of the Board, and the issuance of checks by the Auditor/Comptroller’s office did not usurp, interfere with or transfer the Board’s ultimate authority. Assistant City Attorney Gleeson also based her conclusion on the fact that there were no facts to show that the Auditor/Comptroller’s performance of this function hindered the Board the performance of its duty.

The Assistant City Attorney’s August 28, 1998 opinion does not take into account current conditions facing SDCERS and is mistaken with regards to interpretation of the City Charter provisions..

Assistant City Attorney Gleeson relies upon Charter Sections 80 through 84 which, in the City Attorney’s words, “establish procedures for the payment of the City’s expenses while safeguarding the financial security of the City Treasury,” noting that the Auditor

² This power has now been transferred to the CFO under Charter Section 39.

“serves as a gatekeeper to the City Treasury of which the Retirement Fund is a part.”³ The City Attorney also states that, “Section 83 of the Charter ensures that all requests for payment are made through the Auditor, **and not paid unless approved by the Auditor.** The City Attorney then concludes that these sections setting forth the Auditor/Comptroller’s duties reflect the intent that SDCERS use the City Auditor for its payroll functions. A review of the Charter sections reveals no such intent with regard to the retirement fund.

In fact, Assistant City Attorney Gleeson admits that the Board bears the ultimate authority and ultimate responsibility to deliver benefits and, in turn, the liability for failure to pay those benefits should the Auditor refuse to do so.

Charter Sections 80 through 84 deal with the Comptroller’s duties vis-à-vis payment of claims *against the City*.⁴ These sections were written prior to the passage of Art. 16, §17 of the California Constitution giving boards of public retirement systems more independence from their plan sponsors.

The City Attorney opinion also relies upon Charter language stating that SDCERS is a department of the City, which is contradicted by a prior case determined SDCERS to be a separate entity, independent of the City with all funds required to be segregated from city funds and placed in a separate trust fund “under the exclusive control of the Retirement Board.” *Bianchi v. City of San Diego*, (1989) 214 Cal.App.3d 563.

Further, in *Westly v. Cal. Public Employees Retirement System Board of Administration*, (2003) 105 Cal.App.4th 1095, the state Controller brought an action for declaratory and injunctive relief against the CEO and Trustees of the CalPERS Board of Administration. The Appellate Court analyzed the legislative intent behind the plenary authority language in the California Constitution, stating: “Thus, the voter intent, evidenced by the published ballot materials, is that Article XVI, section 17 *would give the Board the*

³ SDCERS’ funds are no longer kept in the City Treasury. They are now maintained by SDCERS’ custodial bank, State Street. To pay the monthly retirement benefits to participants and beneficiaries, State Street transfers funds once a month to the City’s banking account on which the checks are drawn.

⁴ Charter Section 80 provides that: “No contract, agreement, or other obligation, involving the expenditure of money out of appropriations *made by the Council* . . . shall be entered into, nor shall any order for such expenditure be valid unless the Auditor and Comptroller shall first certify to the Council that the money required . . . is in the treasury”

Charter Section 82 provides that: “The Auditor and Comptroller shall examine all payrolls, bills, and other claims and demands, except claims for damages against the City, and shall issue no warrant or check-warrant for payment unless he finds that the claim is in proper form, correctly computed, and duly approved, that it is legally due and payable” It also provides that the Auditor/Comptroller may investigate claims, examine any person under oath and if he finds the claim to be fraudulent, erroneous or otherwise invalid, he shall not issue a warrant. If he does, he and his sureties are jointly liable to the City for the amount paid.

Charter Section 83 provides that the Auditor/Comptroller will not pay any claims *against the City* unless the claim is evidenced by voucher approved by the head of the Department.

Charter Section 84 provides that no money will be drawn from the treasury of *the City*, nor will any expenditure be incurred except in pursuance of the Annual Appropriation Ordinance and that any unused funds *except for retirement funds* and other trust funds established by the City revert to the funds from which they were appropriated.

authority to administer the investments, payments and other services of CalPERS . . .”, noting that the purpose of the amendments to the Constitution was to protect pension funds from interference by the government entity sponsoring the plan.

In this case, payment of benefits to participants and administrative expenses of the System falls squarely within the Board’s plenary authority to administer the assets of the system. SDCERS’ General Ledger system will allow it to pay SDCERS’ administrative expenses and benefit payments in a more efficient and cost-effective manner thus complying with SDCERS’ fiduciary duty to ensure prompt delivery of benefits and other services, prompt and accurate financial reporting and control over lowering of operating expenses. The City’s current and new GL systems are less efficient than SDCERS’ proposed system and will interfere with SDCERS’ ability to comply with its fiduciary duties over administration of the system. SDCERS has the right and the duty to gain control over its financial reporting system and its assets. Thus, SDCERS may install its own GL system, open its own checking account and issue its own checks.

ISSUE NO. 2:

May SDCERS control reimbursement of system expenses by cutting its own checks in lieu of the City Auditor/Treasurer⁵?

ANALYSIS:

The Comptroller’s role in auditing and paying claims may fall into a ministerial or discretionary category depending upon the factual circumstances involved. The Comptroller’s discretionary or fact-finding powers generally involve a determination of factual circumstances necessary to establish the validity of a particular claim. The Comptroller’s duty to issue a check is ministerial if the amount of an expenditure is set by law or is entrusted to the discretion of another agency or branch of government. *Tirapelle v. Gray Davis, as Comptroller*, (1993) 20 Cal.App.4th 1317, 1328-1329. It has long been the law that a public official, such as the City Auditor or Treasurer, may delegate purely ministerial acts to others. *Sacramento Chamber of Commerce v. Stephens*, (1931) 212 Cal. 607, *Schechter v. County of Los Angeles*, (1968) 258 Cal.App.2d 391,

The Auditor/Comptroller has the right to audit payments of SDCERS checks but, as Deputy City Attorney Gleeson admits in her Memorandum of Law, does not have discretion to refuse to issue checks for payment of SDCERS’ expenses since the authority to determine and approves expenses of SDCERS lies solely with the Board. As the Auditor has no discretion to refuse to make such payments, his or her act in issuing checks is purely ministerial in nature and may be delegated to SDCERS.

⁵ The Charter provides that the City Auditor issues warrants. However, amendments to Charter Section 45 transferred this power to the City Treasurer. For purposes of this opinion, any reference to the power of the Auditor to issue warrants applies equally to the Treasurer.

ISSUE NO. 3:

May SDCERS open its own checking account or does the City Charter provide that only the City Treasurer may open checking accounts?

ANALYSIS:

Section 45 of the Charter provides that the Treasurer shall receive, have custody of and disburse City moneys upon the warrant of the CFO and that the Treasurer "shall determine pursuant to the general law of the state, the selection of depositories for City funds." Charter Section 145 provides that, "All moneys contributed by employees of the City or appropriated by the Council or received from any other source under the terms of this Article, shall be placed in a special fund in the City Treasury to be known as the City Employees' Retirement Funds" Section 145 also provides that SDCERS' funds shall not be merged with other funds of the City.

The City has recognized that the Board has exclusive and plenary authority to make decisions over custody arrangements for the System's funds and assets in that SDCERS has, without any objection from the City, placed its funds with its custodial bank and not in the City Treasury. Section 45 gives the Treasurer authority to chose where City funds are deposited but does not give the Treasurer control over SDCERS' funds. As Retirement Fund monies are trust assets and not part of City Funds, the Charter does not give the Treasurer exclusive power over choice of depositories for SDCERS' funds. Therefore, SDCERS may chose to open its own checking account and deposits SDCERS funds within that account.

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