

DATE: September 14, 1989

TO: Retirement Board of Administration Via Larry
Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Continuances to Surviving Spouses

You have been informed that several safety member retirees were advised in the very early 1970s that in the event of their death, their eligible surviving spouses would receive a fifty percent (50 percent) continuance of retirement benefits. This representation was made to those members at a time when such benefit was not legally in effect. As a result of those contacts, you asked us to review the situation and advise you of your responsibility and obligations. We have thoroughly reviewed the matter and have concluded that the Retirement System is obligated to pay continuances to surviving spouses in those instances brought to its attention. Our analysis follows.

In 1971, the City Council enacted Ordinance No. O-10479 which significantly improved the retirement benefits of participating members. These changes were voted upon by the membership, and approved, as required by Charter section 143.1. The cost of the changes was such that the Council directed that the improvements be phased in over a three year period, specifically to be effective July 1, 1971, July 1, 1972 and July 1, 1973.

The provision relating to "Continuance to Surviving Spouse" was promulgated (Municipal Code section 24.0521) so as to become effective July 1, 1973. The Code section is very clear in its construction and understanding that it would apply only to members who retire on or after July 1, 1973. Consequently, absent other overriding factors, no obligation to persons retiring prior to that date is legally due and any payment to the contrary would be illegal and a breach of your responsibilities. It is the practice of the Retirement Office to issue a letter certificate to each person retiring, indicating therein the date of retirement and the dollar amount of retirement benefit

payable, with further explanation of calculations used such as age, years of service, cost of living increases, etc. There is further included information as to any benefit that may inure to the surviving spouse in the event of the retiree's death.

The letters which have been brought to your attention are: (1) to O.J. Roed, dated January 26, 1972; (2) to Warren G. Morrison, dated February 20, 1973; (3) Iris M. Morrison, dated March 23, 1981; and (4) William J. Krahn, dated April 26, 1973. We note

that in each letter the representation is made that the retiree's eligible spouse would, in the event of the retiree's death receive a "continuance to surviving spouse" benefit of fifty percent (50 percent). This representation is made by the (then) Retirement Officer despite the language of the retirement ordinance to the contrary (that is, the benefit is authorized only to those who retire on or after July 1, 1973).

As stated earlier, any payment in contravention of the Code, absent other overriding factors, would be illegal. The one factor we are confronted with in these cases, however, is overriding, and serves to create an obligation of the system to pay such continuance benefit. That is the application of the doctrine of estoppel.

As stated in Witkin's Summary of California Law (9th edition, 1987) Estoppel in its usual application is based upon a representation of fact which the party is not permitted to deny.

The doctrine of promissory estoppel is distinct, and applies even though there is no misrepresentation: one who makes a promise upon which another justifiably relies may be bound to perform it, despite lack of consideration; . . . (Id. at 249, 250.)

This doctrine has been applied in many California cases. (Citations omitted.) There can be no estoppel when one of the factors is missing.

Essentially, therefore, estoppel has a two-pronged test: a representation and reliance thereon to one's detriment.

Prior to the members of the system voting upon the changes to the Retirement System (to commence initially in 1971) they were presented a document dated February 27, 1970, entitled "Proposed Changes to Retirement Benefits, An Election Report." This report

from the Retirement Board was intended to fully inform members of the proposed changes and the resulting cost to both employees and the City. The report was informational for purposes of the election, as required by Charter section 143.1

After the election and adoption of the ordinance (adopted on January 12, 1971) by the Council, a second report dated February 12, 1971 issued by the Retirement Board, entitled "New Retirement Benefits." This report sets forth in detail the changes that were enacted and the effective dates. Unfortunately, a typographical error and misrepresentation was made on page 3 in regard to benefits to commence on July 1, 1973. The typo indicates "Benefits to Commence on July 1, 1972." Further, in the first full paragraph, the members are advised that:

. . . This new benefit automatically provides

the surviving spouse of a deceased retired member (who retires after February 12, 1971) with a pension equal to 50 percent of the retiree's pension, without the employee having to voluntarily reduce his pension at retirement. . . . (Emphasis added)

Both reports are attached hereto as Attachment A.

The above statement to the members, despite language of the ordinance to the contrary, introduces the first prong (overriding factor) of promissory estoppel. The second prong, which we are advised and believe exists, is reliance thereupon by the individual to his (or her) detriment. Our investigation reveals that certainly some of the individuals (named above) that received letter certificates of retirement, had delayed their retirements sufficiently past the date (mis)represented in the report so that their spouses would be eligible for such continuance benefit. There is also evidence that some of the individuals tailored their future financial plans predicated upon the supposition that the surviving spouses would receive the continuance.

I have also reviewed the member handbooks dated as of July 1, 1971 and find statements therein which would lead reasonable men (and women) to conclude that a continuance would be paid to anyone retiring after the 1971 date but to commence July 1, 1973. In summary, it is our conclusion that the system is estopped to deny its obligation to those individuals retiring within that

time period who come forward with such claim. It is our advice to the Board and System to honor such obligation.

JOHN W. WITT, City Attorney

By

Jack Katz

Senior Chief Deputy City Attorney

JK:pev:352
Attachment
ML-89-91