MEMORANDUM OF LAW

DATE: October 23, 1991

TO: Larry Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Clean Water Department Employees

In a memorandum discussing the new "Clean Water Department" you requested assistance with regard to two retirement issues. Those issues and our responses follow:

1. CERS -- Transferred City Employees. Can CERS contract with the new agency for administration of a defined benefit program in the same manner with which we contract with the Port District? This would mean that all employees would be general members, eligible for general member benefits, but valued separately for actuarial purposes, with funds commingled for investment purposes. Assuming the answer to that question is yes, can CERS use the services of the City Attorney for contract development, etc.?

Again, assuming the answer to the first question is yes, can we assimilate other employees into CERS who have been employed in other non-City public agencies, such as a water district, by transferring all of their employee contributions, employer contributions, plus any amounts determined by our actuary to be necessary for past service liability?

Response: No. There is nothing in either the City Charter ("Charter") or the San Diego Municipal Code ("SDMC") which would authorize a contractual relationship with a new agency similar to that currently in place with the San Diego Unified Port District ("Port District"). Specifically, Article IX of the Charter governing the establishment of City Employees' Retirement System ("CERS"), makes no provision for the contracting of retirement services for employees of other governmental agencies, or for the continuation of retirement benefits for former members of CERS hired by other agencies. As opined by Assistant City Attorney John M. Kaheny in a Memorandum of Law dated August 6, 1991, the only contractual relationship envisioned by the

Charter is one with the State of California for retirement services. Under the Charter, this contractual relationship would be subject to approval by the City Council after a vote of the members of CERS.

While it is true that CERS enjoys a contractual relationship with the Port District, this arrangement was neither initiated by CERS or the City of San Diego nor independently authorized by the Charter as a stand alone proposition. As set forth more fully in the August 6, 1991 Memorandum of Law referenced above, the Port District initiated the contractual relationship with CERS for retirement services. The authority for this contractual relationship was provided pursuant to a 1963 amendment to Section 71 of the San Diego Unified Port District Act, Appendix I, California Harbors and Navigation Code. This amendment gave the Port District the authority to contract with any City, within the Port District, which had a retirement system for retirement and disability benefits for all Port District employees. Pursuant to this amendment, the Port District contracted with the City of San Diego for this service.

Apparently, as currently drafted, the enabling legislation for the new agency (San Diego Area Wastewater Management District ("SAD")) is silent on the entire issue of retirement benefits. This fact coupled with the limiting language of Article IX of the Charter restricting CERS' ability contract with anyone other than the State of California for retirement services suggests that CERS does not have the authority to enter into a contractual relationship with the new agency similar to that in place with the Port District, absent an amendment to the SAD's enabling legislation.

For your information, the transfer of certain City Animal Regulation Division employees to the County of San Diego in 1971 was also reviewed. Pursuant to the Basic Agreement for Animal Regulation Services to be furnished by the County to the City of San Diego ("Basic Agreement") dated March 30, 1971, the City transferred its animal regulation function and transferred certain of its employees and equipment to the County. All transferred employees became members of the County Employees' Retirement System.

According to paragraph 7, Article III of the Basic Agreement, the City transferred from its General Fund to the County Employees' Retirement fund an amount equal to employer contributions into the City's Retirement System fund on the effective date of the Basic Agreement on behalf of those employees electing to transfer to the County, provided that the employees making the transfer placed their City Employees' Retirement fund contributions into the County Employees' Retirement fund. The transferred funds were to be used by the County as employer contributions for each transferred employee with the employee receiving County retirement credit up to the monetary amount placed into the County Employees' Retirement fund for each transferring City employee.

Support for the transfer of the above-referenced City employees to the

County Employees' Retirement System was based upon the County Board of Supervisors' decision to make operative the provisions of Government Code section 31641.6. Government Code section relates to credit in the County Retirement System for employees of a city who have become County employees upon the assumption by the County of the functions of the City department in which the said City employees were employed. Effective April 1, 1971, Government Code section 31641.6 became operative in San Diego County.

In light of the foregoing, it is clear that the support transfer of City employees to the County Employees' Retirement System rested with a Government Code section not applicable to the City Employees' Retirement System. Again, absent an amendment to SAD's enabling legislation, we conclude that CERS does not have the authority to enter into a contractual relationship with SAD similar to that with the Port District.

2. SPSP -- It appeared to be the opinion of the group that none of

> the SPSP programs could be extended to employees of this new agency. Assuming that to be the case, could we use Municipal Code section 24.0205 as a means to establish a defined contribution program to mirror SPSP? Something like this is necessary, I think, to keep the benefits structure comparable to the current City structure and to handle Federal requirements regarding Social Security enrollment.

Response: No. The use of SDMC section 24.0205 as a vehicle for establishing a defined contribution program to mirror SPSP poses several problems. First, resolution of this issue in the manner you suggest presupposes membership in CERS pursuant to a contractual relationship with the new agency such as that currently in place with the Port District. As set forth above, such a relationship is not advisable now, absent authority in the new agency's enabling legislation allowing for this relationship. Assuming a subsequent amendment to SAD's enabling legislation to authorize a contractual relationship as suggested, there are still problems with the use of excess contributions under SDMC section 24.0205.

Briefly, SDMC section 24.0205 allows a member to "elect to make additional contributions at rates in excess of his normal contributions, for the purpose of providing additional benefits." In addition, "┌tσhe exercise of this privilege by a member, . . . shall not require the City to make any additional contributions." Importantly, any additional contributions made pursuant to this section "may not be withdrawn except upon termination of membership and then only in the event the employee withdraws all of his normal and additional accumulated contributions." There are significant differences between the contributions contemplated by SDMC section 24.0205 and those contemplated by the SPSP plans. Unlike

SDMC section 24.0205, the SPSP plans specifically provide for an employer match and withdrawal of employee and employer contributions under certain circumstances.

In addition, the Charter further limits CERS' ability to establish a "defined contribution" retirement plan such as SPSP or a plan which mirrors SPSP as proposed above. Article IX of the Charter, entitled "The Retirement of Employees" describes a "defined benefit" type of retirement plan. Charter sections 142 and 143 make specific reference to the employment of an actuary and the use of actuarial tables to calculate the contributions for the employer and employees. Such calculations are unnecessary in a defined contribution plan where the benefit is dependent upon and calculated according to the contributions made to the plan. Lacking support in the Charter for the administration of a defined contribution plan such as SPSP, CERS was never given the opportunity to run the City's SPSP plans. It is for this reason that the City's SPSP plans are administered by the Risk Management Department rather than by CERS. Absent a change in the Charter, we advise against the implementation of any defined contribution plan such as the one proposed in your memorandum using excess contributions pursuant to SDMC section 24.0205.

According to the August 6, 1991 Memorandum of Law, discussed above, it is possible for a new agency such as SAD to establish a qualified defined contribution plan similar to SPSP in order for former City employees to transfer their taxable employer contributions and interest earnings to such an account. Under such a plan, it is possible for the SAD to provide an employee with the same vesting schedule as the employee had with the City of San Diego. If such a plan were to be implemented, the responsibility for administering it would rest with the new agency.

JOHN W. WITT, City Attorney
By
Loraine L. Etherington
Deputy City Attorney

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cc Dave Schlesinger
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