

## MEMORANDUM OF LAW

DATE: November 7, 1991  
TO: Larry Grissom, Retirement Administrator  
FROM: City Attorney  
SUBJECT: Age 65 Retirement

In a memorandum dated October 22, 1991 you requested clarification of a memorandum dated August 1, 1991 prepared by this office concerning a former City Charter requirement regarding compulsory retirement at age 65. You correctly note that the compulsory age 65 requirement was removed from the City Charter pursuant to the passage of Proposition "K" approved by the voters in the November, 1990 election. Your specific questions and our responses follow:

Question No. 1 May we continue the payment of prorated benefits to persons over age 65 with less than 10 years of service?

Answer: Yes. "A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity." (Citations omitted.) *Betts v. Board of Administration*, 21 Cal. 3d 859, 863 (1978). In addition, "the employee does not obtain, prior to retirement, any absolute right to fixed or specific benefits, but only to a 'substantial or reasonable pension.'" (Citation omitted.) *Id.* Finally, the courts have repeatedly observed "that even such 'vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system." (Citation omitted.) *International Assn. of Firefighters v. City of San Diego*, 34 Cal. 3d 292, 300-301 (1983).

Prior to February 19, 1991 section 141 of the Charter for The City of San Diego ("Charter section 141") contained both a requirement for compulsory retirement at age 65 years and a mandatory ten years of continuous service provision. As a result of the Age Discrimination and Employment Amendments of 1986 (Public Law 99-592, 100 Stats. 3342 1986) ("Act") and the United States Supreme Court ruling in *EEOC v. Wyoming*, 460 U.S. 226 (1983), the compulsory retirement at age 65 years provision of Charter section 141 became preempted by federal law which was construed to be controlling over local law. As such, the compulsory retirement at the age of 65 years for City employees, other than police officers or firefighters contained in Charter section 141 was rendered inoperative by the Act.

In an effort to harmonize the conflicting Charter provisions regarding the 10 year continuous service requirement and the stated but inoperative compulsory retirement at age 65 years provision a decision was made by the retirement system to approve service retirement benefits to those persons who found themselves in the catch 22 situation presented by these conflicting Charter provisions. Prorated retirement allowances have been paid and should continue to be paid to those persons who retired at age 65 years with less than 10 years of continuous service. Employees in this situation have a vested right to the award and continuance of this benefit because it was in effect during their employment. *Betts v. Board of Administration*, 21 Cal. 3d 859, 866 (1978).

Question No. 2 Am I correct in assuming that the correction of this situation as suggested in your August 1, 1991 memo would be prospective and applicable to those persons hired on and after the effective date of the adoption of the corrective Code changes?

Answer: Yes. Please be advised, however, that with respect to the award of prorated retirements, a cut-off date has already been established. Pursuant to the passage of Proposition "K" in the Special Municipal Election held on November 6, 1990, the compulsory retirement at age 65 years provision of Charter section 141 was removed from the Charter, effective February 19, 1991. The 10 years continuous service requirement still remains in effect. As such, all members of the retirement system who become members on or after February 19, 1991 must satisfy the 10 years continuous service requirement in order to be eligible for a service retirement. For your information, any other corrections suggested by the memorandum dated August 1, 1991 would become effective on the effective date of their respective code changes.

Question No. 3 In the alternative, should the correction be considered to begin on the date in November, 1990 when the voters approved the change in the Charter to remove the requirement for compulsory retirement at age 65?

Answer: No. As set forth in our response to Question No. 2, the effective date for the deletion of the compulsory retirement at age 65 years is February 19, 1991. This date is the critical date. Prorated retirements for members who retire at age 65 years with less than 10 years of continuous service are available if the member joined the retirement system before February 19, 1991. If the member retires on or after February 19, 1991, however, a prorated retirement at age 65 years with less than 10 years of continuous service is not available.

Question No. 4 Am I correct in assuming that all persons hired on or before whatever prospective date is adopted would be eligible for a prorated retirement benefit, assuming that the other necessary conditions are met?

Answer: No. Only those persons hired before the effective date of February 19, 1991 and who also became members of the retirement system before this date would be eligible for the prorated retirement benefit, assuming that all other conditions were met. Persons joining the retirement system on February 19, 1991 must complete 10 years of continuous service to be eligible for a service retirement.

Question No. 5 Does any of the above apply to deferred retirements? In other words, may a person leave their contributions with the System after terminating their employment at age 50 with 5 years of service and anticipate a prorated benefit at age 65?

Answer: No. The 10 years of continuous service requirement found in Charter section 141 remains unchanged. The prorated retirement allowance described in this memorandum is contingent upon the member being actively employed on or after age 65 years followed by his or her subsequent application for a retirement on or after age 65 years. Thus, the member in your hypothetical who terminates employment at age 50 years with 5 years of service has not met the 10 years continuous service requirement.

I hope this memorandum addresses your concerns. I am available to assist you in preparing the additional changes to the SDMC as further suggested by the memorandum dated August 1, 1991.

Please contact me if you have any questions.

JOHN W. WITT, City Attorney

By

Loraine L. Etherington  
Deputy City Attorney

LLE:mrh:352(x043.2)

ML-91-91 Corrected