

MEMORANDUM OF LAW

DATE: December 16, 1992

TO: Larry B. Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Buy Back of "Air Time"

In a memorandum dated November 18, 1992, you explain that the Board directed you to ask the City Attorney to research whether the "Air Time" buy back provisions of San Diego Municipal Code ("SDMC") sections 24.0208 and 24.0310 apply in various hypothetical situations. Specifically, whether it is possible for an individual to buy back creditable service for periods when he or she has been receiving industrial, nonindustrial or service retirement benefits from the City Employees' Retirement System ("CERS")?

Attached you will find three past opinions rendered from this office which answers these questions for you. In short, SDMC section 24.1000 precludes the permanent rehiring and consequent reinstatement into CERS of any individual who has been retired from City service, with the exception of a rehire and reinstatement pursuant to SDMC section 24.0510.

SDMC 24.0510 expressly provides that a disability allowance shall cease upon reinstatement pursuant to this section. Although not applicable to CERS because we are a government plan within the meaning of Internal Revenue Code ("IRC") section 414(d), it is worth noting that forfeiture of benefits upon re-employment is a well recognized exception to the general federal laws pertaining to "nonforfeitability" of vested rights. (See IRC section 411(a)(3)(C).)

Turning to the issue of buy back, it is clear that an individual reinstated into CERS pursuant to SDMC section 24.0510 cannot buy back, under the authority of SDMC sections 24.0208 or 24.0310, the period of time he or she was receiving disability benefits. Sections 24.0208 and 24.0310 apply only to reinstatement and buy back for persons who were "terminated from service" and then reemployed. A person who has "retired from service," whether it be for service or disability, does satisfy this criteria and thus is not entitled to this benefit.

SDMC sections 24.0208 and 24.0310 were enacted and are

intended to provide a mechanism for a reemployed individual to get reinstated into CERS, to repay their previously "cashed out" distribution and to have their forfeited account reinstated. (See Op. City Att'y 29 (1981).) Again, although not applicable to CERS as a government plan, it is interesting to note that federal law requires affected plans to provide this type of mechanism for a terminated (not retired) individual to repay a prior distribution and to have any forfeited benefits restored upon reemployment. (See IRC section 411(a)(7)(C).)

I hope this memorandum addresses your concerns. Please contact me if you have any questions.

JOHN W. WITT, City Attorney

By

Richard A. Duvernay

Deputy City Attorney

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Attachments

ML-92-116