MEMORANDUM OF LAW

DATE: March 9, 1992

TO: Larry B. Grissom, Retirement Administrator
FROM: City Attorney
SUBJECT: Age 65 Retirement - Proposed Change in San Diego City Charter Section 141 Concerning 10-year Vesting Requirement

In a memorandum dated January 29, 1992, you requested a legal opinion concerning the legality of a proposed benefits change which would allow active employees over age 65 to retire with less than 10 years of service. We conclude that such a proposal can withstand legal challenge if the Charter for the City of San Diego is amended to provide for this benefit. Our analysis follows:

BACKGROUND

Charter Section 141 provides in pertinent part:

> No employee shall be retired before reaching the age of sixty-two years and before completing ten years of continuous service, except such employees may be given the option to retire at the age of fifty-five years after twenty years of continuous service with a proportionately reduced allowance. Policemen, firemen and full time lifeguards, however, who have had ten years of continuous service may be retired at the age of fifty-five years, except such policemen, firemen and full time lifeguards may be given the option to retire at the age of fifty years after twenty years of continuous service with a proportionately reduced allowance.

Charter Section 141 clearly mandates a ten year vesting requirement. Currently, there are no age-based exceptions to this requirement. The benefits change you have suggested would allow active employees over age 65 to retire with less than 10 years service. The 10 year requirement would remain for all other employees. As such, the proposed benefit would require an amendment to Charter Section 141.

Assuming that the voters of San Diego approve the proposed amendment, we further conclude that the new benefit will withstand legal challenge. As currently proposed, the less than 10 years vesting requirement for active employees age 65 and over will not violate either the Age Discrimination in Employment Act ("ADEA") of 1967, as amended, 29 U.S.C. Sections 621 et. seq. (1990) or the equal protection clause of

either the state or federal constitutions.

DISCUSSION

Under the ADEA, an employer may not fail "to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. Section 623(a). A service retirement is a benefit under the City Employees' Retirement System ("CERS"). CERS is a bona fide employer benefit plan under the ADEA. The City of San Diego ("City") is an employer under the ADEA. As such, neither the City nor CERS may discriminate against its employees/members on the basis of age. Significantly, the ADEA is focused on older workers who "find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs." 29 U.S.C. Section 621(a)(1). In particular, as further noted in the congressional statement of findings regarding the ADEA:

> (2) The setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desireable practices may work to the disadvantage of older persons;
>
> (3) The incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave.
>
> (4) The existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. Section 621(a).

Finally, the stated purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. Section 621(b).

In light of the foregoing, the proposed benefit change allowing active employees age 65 or older to retire with less than 10 years continuous service and receive a prorated retirement allowance would not violate the spirit or the letter of the ADEA. In fact, the contrary is true. The proposed benefit change recognizes the concerns of older workers and provides them the opportunity for a benefit commensurate with their City service.

With respect to challenges under the equal protection clause of the

state or federal constitutions, we conclude that the proposed benefit change, if accomplished through a charter amendment, will survive judicial scrutiny. Under an equal protection challenge, the issue is whether the award of this benefit unlawfully discriminates against younger employees who must be members for 10 years before receiving a retirement allowance at the designated age of either 55 or 62.

Article I, section 7, subdivision (a) of the California Constitution guarantees "a person may not be . . . denied equal protection of the laws; . . ." A similar guarantee is found in the federal constitution. As such, "no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property, and in their pursuit of happiness." (Citation omitted.) Hinman v. Department of Personnel Admin., 167 Cal. App. 3d 516, 524 (1985). Significantly, the state is not precluded from drawing any distinctions between different groups of individuals pursuant to equal protection principles. Any distinctions drawn, however, must show at a minimum that "persons similarly situated with respect to the legitimate purpose of the law receive like treatment." (Citation omitted.) Id. at 525. "The purpose of the clause is to secure every person against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (Citation omitted.) Id.

Challenges under the equal protection clause of the state or federal constitutions involve the application of either a "rational basis" test or a "strict scrutiny" test depending on the interest affected or the classification involved. Rittenband v. Cory, 159 Cal. App. 3d 410, 417-418 (1984). Cases involving "suspect classifications or where the challenged legislation adversely affects 'fundamental interests'" require the strict scrutiny test. All other cases use the rational basis test. Id.

Significantly, "age is not recognized under either the California or the federal Constitution as a 'suspect' classification." Id. As such, the rational basis test will be used as long as no fundamental interests are involved. Under this test, the legislative classification must "bear some rational relationship to a conceivable legitimate state purpose." (Citation omitted.) Id. at 424.

Under the "rational relationship" standard, the court "employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. Such action by a legislature is presumed to be valid." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314, 49 L.Ed.2d 520, 525 (1975). In short, a provision employing a legislative classification based on age will not be overturned "unless the varying treatment of different groups or persons

is so unrelated to the achievement of any combination of legitimate purposes" that a court could only conclude that the legislature's actions were irrational. Martin v. Tamaki, 607 F.2d 307, 309 (1979) citing, Vance v. Bradley, 440 U.S. 93, 59 L.Ed.2d 171 (1979).

Applying the foregoing, we conclude that the age distinction embodied in the proposed benefit change rests on a rational basis. As recognized by the ADEA, the "state" or its representative (CERS) clearly has a legitimate interest in protecting the older worker. Rittenband v. Cory, 159 Cal. App. 3d at 428-429. Moreover, the proposed benefit change addresses the concerns raised in the above-described congressional statement of findings regarding the ADEA in a positive way by allowing older workers to have the choice to leave City service with a benefit commensurate with their City service or to continue active employment. In light of the fact that several of the CERS benefits such as post retirement health insurance and the 13th check require 10 years of service, many employees age 65 or older will undoubtedly continue working until this requirement is met if they can do so. The proposed prorated benefit for employees age 65 and older with less than 10 years, however, will be available to those older employees who cannot meet the service requirement because of health considerations. As such, there is a rational basis connecting the legislative classification and a legitimate governmental purpose.

CONCLUSION

The benefits change proposed by the Board which would allow active employees age 65 or older to retire with less than 10 years service and receive a prorated benefit will withstand legal challenge. Assuming the Charter is amended, the proposed benefit change will not violate either the ADEA or the equal protection clause of the state or federal Constitutions.

I hope this Memorandum of Law addresses your concerns. Please contact me if I can be of further assistance.

JOHN W. WITT, City Attorney
By
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Deputy City Attorney

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