

MEMORANDUM OF LAW

DATE: March 10, 1992

TO: Larry B. Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Role of Retirement Board in Meet and Confer

In a memorandum dated January 29, 1992, you requested a legal opinion on the subject of Board's role in the meet and confer process. As background, you have identified three categories of retirement benefits which may warrant different meet and confer considerations. They are actual benefits and benefit levels, application of benefits and procedural considerations involving rules and regulations of the Board. Specifically, you have posed three questions. Our analysis, including responses to your questions follows.

BACKGROUND

The Meyers-Milias-Brown Act ("MMBA"), Government Code sections 3500-3510, governs labor management relationships in California local government. Cities, counties and most special districts are covered by law. Significantly, charter cities are covered by the MMBA. Government Code section 3501(c); *People ex Rel. Seal Beach Police Officers Assn. v. City of Seal Beach*, 36 Cal. 3d 591, 597 (1984).

Under the MMBA, public agencies must follow certain principles. Public agencies include: "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not." Government Code section 3501(c). The City of San Diego ("City") is clearly a public agency under the MMBA. The City Employees' Retirement System ("CERS") is also a public agency under the MMBA in those situations limited to procedural considerations involving the Board's rules and regulations.

The meet and confer requirement of Government Code section 3505 requires the public agency to "meet and confer with employee representatives in good faith regarding wages, hours, and other terms and conditions of employment' and to 'consider fully' such employee presentations." *Los Angeles County Civil Service Com. v. Superior Court*, 23 Cal. 3d 55, 61 (1978). Importantly, a public employee's pension constitutes an element of compensation *Betts v. Board of Administration*, 21 Cal. 3d 859, 863 (1978).

According to Government Code section 3505.1, a memorandum of understanding ("MOU") shall jointly be prepared by the public agency and the recognized employee organization if an agreement is reached during

the meet and confer process. The MOU, which is not binding, is then presented "to the governing body or its statutory representative for determination." Government Code section 3505.1. Although the MMBA "encourages binding agreements resulting from the parties' bargaining, the governing body of the agency . . . retains the ultimate power to refuse an agreement and to make its own decision." (Citation omitted.) People ex Rel. Seal Beach Police Officers Assn., 36 Cal. 3d at 601.

Council Policy No. 300-6, entitled "Employee-Employer Relations," implements the provisions of the MMBA by providing orderly procedures for the administration of employer-employee relations between the City and its employee organizations. Specifically, Council Policy No. 300-6 provides procedures for meeting and conferring in good faith with Recognized Employee Organizations regarding matters that directly affect and primarily involve the wages, hours and other terms and conditions of City employment.

DISCUSSION

With the preceding background of the MMBA in mind, we have responded to your specific questions.

Question No 1: What is the Retirement Board's role in the meet and confer process?

Response: With respect to actual benefits and benefit levels involving an increase in the contributions for either the City or the employee that are usually raised during the annual meet and confer process between the City and recognized employee unions, the Board does not have an active role in the meet and confer process. In this context, the Board is not a "public agency" within the meaning of the MMBA. Pursuant to Charter section 70, the power to fix salaries rests with the City Council and City Manager. CERS does not have the authority to raise or lower an employee's compensation. As such, the meet and confer obligation in this situation involves the City and the relevant employee organizations involved.

Please be advised, however, that anything which impacts a change in the benefit structure for CERS must also be approved by a majority vote of the active membership of CERS. Charter section 143.1. Moreover, if vested, defined benefits of any retiree of CERS is involved, any ordinance affecting these benefits must be approved by a majority vote of the retirees involved. Charter section 143.1. In either situation, the duty of the City to meet and confer in good faith on the subject of employee benefits is in no way infringed by the CERS' membership's reservation of authority to ultimately approve any results of the bargaining process. The MMBA clearly recognizes this procedure. Government Code section 3505. United Public Employees v. City and County of San Francisco, 190 Cal. App. 3d 419, 426 (1987).

Simply stated, the traditional meet and confer obligation rests with the City and relevant employee organizations rather than CERS because they are the source of the money to fund the proposed benefit.

This does not mean, however, that CERS is completely removed from this process. As you correctly indicate, the Board should have a designated representative in this process to act as a resource, to ensure the fiscal integrity of the Retirement System, and to provide information to the Board on the meet and confer process.

In this regard, the Board is in a position similar to that of the City's Civil Service Commission ("CSC"). With respect to the traditional meet and confer process conducted annually, the CSC is not a public agency within the meaning of the MMBA. Like CERS, it does not have the power to directly affect an employee's compensation. The CSC, however, is the representative designated by the Charter for the City of San Diego ("Charter") to administer the rules and regulations governing the selection, promotion and removal of all City employees for the classified service. Charter section 115. As such, in matters involving these rules and regulations, the CSC fits within the MMBA's definition of a public agency. Los Angeles County Civil Service Com., 23 Cal. 3d at 64.

Recognizing the CSC's limited role in the traditional meet and confer process, the Council, by resolution, appoints the Personnel Director to its Management Team for all purposes other than meet and confer. In light of the similarities with the Board and its role in the meet and confer process, we recommend the same procedure for the Board. This procedure accurately reflects the respective roles of the participants. Moreover, in the traditional meet and confer process, it is the Council, by and through its representative, the Management Team, who has the responsibility to meet and confer. As such, the Council should make the appointment of a CERS representative to the Management Team. The Board, however, should make the recommendation of their choice for a representative to the Council for appointment.

If the issue before the Board involves the application of benefits or procedural considerations involving the Board's rules and regulations, the Board's role in the meet and confer process, like that of the CSC in its analogous situation, is more active. In this context, we note that the Charter and the San Diego Municipal Code ("SDMC") place with the Board very broad authority and responsibility for the application and implementation of benefits. Charter section 144 provides in pertinent part: "The Board of Administration shall be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system."

Pursuant to SDMC section 24.0901, the Board:

May make such rules and regulations as it deems proper for the administration of the Retirement System, and subject to this ordinance and those rules the Board may modify benefits for service and disability, and also determine who are employees, and

shall be the sole judge of the condition under which persons may be admitted to and continue to receive benefits under this system.

In light of the foregoing, the Board fits within the definition of "public agency" in Government Code section 3505 as a representative designated by the City's Charter to administer rules and regulations for its members. Los Angeles County Civil Service Com., 23 Cal. 3d at 64.

Thus, when faced with an issue involving a change in the application of benefits or in the operational procedures developed to administer retirement benefits, the Board's role is more active. When the issue concerning the Board's rules arises during the annual meet and confer negotiations, the Board's representative could participate directly at the negotiating table with the employee organizations or delegate the authority to the Management Team in accordance with similar procedures set forth in Council Policy No. 300-6 involving the limited participation of the Personnel Director at the negotiating table in similar situations. If, however, the issue concerning the Board's rules arises mid-year on a stand alone basis, the Board's designated representative is required to directly meet and confer on the issue as necessary and appropriate. In this limited context, the Board's designated representative would meet with employee representatives "(1) promptly on request; (2) personally; (3) for a reasonable period of time; (4) to exchange information freely; and (5) to try to agree on matters within the scope of representation." Los Angeles County Civil Service Com., 23 Cal. 3d at 61.

Question No. 2: Should the Board be specifically represented in the formal meet and confer process?

Response: Yes. As set forth more fully in the response to question No. 1, the Board should have a designated representative available to act as a resource, to ensure the fiscal integrity of the Retirement System and to provide information to the Board on the meet and confer process when changes in actual benefits and benefit levels are proposed. Since any such proposals are under the City Council's purview, they are subject to meet and confer between the City Council and relevant employee organizations.

Under the MMBA, the City Council is authorized to designate a Management Team as its representative to accomplish the meet and confer process on its behalf. Presently, the City Council designates members of the Management Team by resolution. Those members include the City Manager, Assistant City Manager, Labor Relations Manager, a Deputy City Attorney and a professional labor consultant. In addition, the City Council designates the Personnel Director as a member of the Management Team for all purposes except meeting and conferring with employee organizations. In limited situations involving the personnel rules and

regulations, the Personnel Director may play a more active role in the active negotiations. As discussed more fully in the responses to Question Nos. 1 and 3, we recommend a similar appointment process for the Board's representative.

With respect to issues involving a change in the application of benefits or the Board's operational procedures, the designated representatives role is more active. In this situation, the Board's representative could negotiate directly with the relevant employee organizations or delegate this authority to the Management Team pursuant to Council Policy No. 300-6.

Question No. 3: Assuming the answer to the previous question is yes, who should be designated as the Board's representative?

Response: The Retirement Administrator should be designated as the Board's representative in the meet and confer process for all situations discussed in this memorandum. Typically, this individual is the most knowledgeable on the subject of benefits available under CERS and the Board's rules and regulations for implementing those benefits. In addition, to avoid any appearance of potential conflict, the Retirement Administrator's loyalty rests only with CERS. In this regard, we highlight Council Policy No. 000-4 which sets forth a Code of Ethics for all elected officials, officers, appointees and employees of The City of San Diego. It states in pertinent part:

No elected official, officer, appointee or employee of The City of San Diego shall engage in any business or transaction or shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties or would tend to impair his independence or judgment or action in the performance of such duties.

According to Charter Section 117, all Board members are employees of the City regardless of the manner in which they serve on the Board. As such, Council Policy No. 000-4 applies to all Board members.

In light of Council Policy No. 000-4, the selection of a Board member to represent the Board in the meet and confer process is not advisable. Such a selection places the Board member in a difficult position potentially violative of Council Policy No. 000-4. Board members act as fiduciaries to the Retirement System. Their primary loyalty is to the pensioner/beneficiaries of the Retirement System. In the meet and confer process, however, the bargaining representative represents either the employer or the employee. The best interests of the plan at the negotiating table are not necessarily compatible with those fiduciary responsibilities. As such, the selection of any Board member for the meet and confer process as a representative of the Board

is not advisable. In light of the foregoing, we recommend the selection of the Retirement Administrator as the Board's designated representative in the meet and confer process. The Retirement Administrator is, without question, the most knowledgeable person on the subject of CERS' benefits and CERS' rules and regulations for implementing those benefits. In addition, as the administrator for CERS, he is primarily concerned with the integrity of the system.

To accomplish his selection and to secure uniformity in the meet and confer process, we recommend an appointment process similar to that of the Personnel Director. Accordingly, with respect to the formal meet and confer process, the Board should request the Council to appoint and designate the Retirement Administrator as a member of the Management Team for all purposes except meeting and conferring with employee organizations. Utilization of this procedure would ensure that the Board receive the information involved in the meet and confer process in a timely, efficient and, if necessary, confidential manner. We also recommend the amendment of Council Policy 300-6 to reflect the role of CERS in the meet and confer process as outlined in this memorandum.

Hopefully, this memorandum has addressed your concerns. Please contact me if you have any questions or need further assistance.

JOHN W. WITT, City Attorney

By

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Deputy City Attorney

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