MEMORANDUM OF LAW

DATE: April 7, 1992

TO: Larry B. Grissom, Retirement Administrator
FROM: City Attorney
SUBJECT: Pre-Existing Conditions; Modification of Definition; Retroactive Effect

In a memorandum dated February 19, 1992, you posed several questions concerning a proposed "refinement" of the definition of a pre-existing condition as defined in our Memorandum of Law dated August 7, 1991. The proposal you suggest would amend the definition of a pre-existing condition to include any disease or injury that occurred during City employment as a potential disabling condition for disability retirement. We are assuming also that the proposed amendment would require membership in the Pension Act of 1981 ("1981 Plan") at the time the alleged disabling condition arose. Further, under the proposed amendment, any condition which occurred prior to City employment and prior to membership in the 1981 Plan would continue to be excluded. You have indicated that it is the desire of all concerned to amend the definition of pre-existing condition to allow this. With this background in mind, we have responded to your questions.

Question No. 1. How can this change be accomplished? Can it be done administratively, with formal statements from the parties involved and approval from the Retirement Board?

Answer: The proposed modification of the definition of pre-existing condition can be accomplished. However, due to the retrospective nature of the modification and the history of the pre-existing condition exclusion itself, any such modification will require the full formal process of a benefit change. In this regard, we note that the proposed modification requires more than a refinement or reinterpretation of the existing definition. Significantly, it involves retrospective inclusion of one of the expressly mandated statutory exclusions.

By definition, "a retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." (Citations omitted.) Aetna Cas. & Surety Co. v. Ind. Acc. Com., 30 Cal. 2d 388 (1947). Moreover, "it is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." Id. at 393.

In addition, it is a well-settled rule of statutory interpretation

that a statute, clear and unambiguous on its face, requires no further construction. Guelfi v. Marin County Employees' Retirement Assn., 145 Cal. App. 3d 297, 298 (1983). "Effect must be given to a statute according to the usual and ordinary import of its language." Id. Finally, even though pension legislation is to be liberally construed, "this rule of liberal construction is applied for the purpose of effectuating the obvious legislative intent and should not blindly be followed so as to eradicate the clear language and purpose of the statute." (Citation omitted.) Guelfi v. Marin County Employees' Retirement Assn., 145 Cal. App. 3d at 303.

A review of the pre-existing condition exclusion and its legislative history supports our conclusion that it does not clearly appear from the language of the San Diego Municipal Code ("SDMC"), or by necessary implication, that the City Council intended to apply the pre-existing condition in the manner suggested by your proposed modification. In fact, a contrary view appears in the legislative history.

With respect to the history of the pre-existing condition exclusion itself, we note that it first appeared in SDMC section 24.1120. This section, entitled "Industrial Disability-Safety Member" became effective on October 11, 1985. Pursuant to SDMC section 24.1120, safety members of the 1981 Plan were awarded industrial disability retirement benefits provided that the injury permanently incapacitating them from the performance of duty arising out of or in the course of their employment did not arise from a pre-existing medical condition or a nervous or mental disorder, irrespective of claimed causative factors. From its inception, pre-existing conditions have been defined as any medical condition which arose prior to the date the benefit was created, irrespective of City employment. SDMC section 24.1120 was subsequently amended effective June 15, 1989, to include general members as well.

The adoption of subdivisions(d) and (e) of SDMC section 24.1102 on January 1, 1988 and July 1, 1989, for safety and general members, respectively, created the availability of non-industrial disability retirements for these groups. Each of the above-described amendments, spanning a five year period, was subject to meet and confer, ratification by the active members of the Retirement System and approval by the Board and City Council. Importantly, at the time of the enactment of SDMC section 24.1120 and any amendments thereto and at the time of the adoption of subdivisions (d) and (e) of SDMC section 24.1102, the issue of retroactivity with respect to the exclusion for pre-existing medical condition expressly stated therein was not raised.

This omission is significant in view of the well-settled proposition that statutes are to be given prospective effect unless a clearly expressed legislative intent appears to the contrary. Aetna Cas. & Surety Co. v. Ind. Acc. Com., 30 Cal. 2d at 393. Had the City

Council desired to carve out an exception to the pre-existing condition exclusion for injuries suffered by 1981 Plan members during the period of "no coverage" it could have done so. Absent such an intent, the modification proposed to allow this can not be implied. Id. at 395.

In sum, the legislative history of the development of disability retirements for the 1981 Plan and the establishment of the pre-existing condition referenced above is clear and unambiguous. As currently drafted, a pre-existing condition is any medical condition occurring before the establishment of the relevant disability retirement benefit at issue. Thus, even though representatives of labor and management now suggest that they were mistaken by the effect of the pre-existing medical exclusion as used in the SDMC, their formal statements cannot be used to implement the proposed modification.

Simply stated, the proposed modification substantially alters the rights and liabilities of the Retirement System and its members. As such, any retrospective application of the proposed modification must be supported by the members, the Board and City Council. Once the proposed modification has been subject to the full formal process of a benefit change, it can be codified in the SDMC.

Question No. 2. If this must be done through the meet and confer process, must it go through the full formal process of meet and confer with all groups, agreement, election to confirm a benefits change, and approval by the Retirement Board and Council?

Answer: Yes. Please see response to Question No. 1.

Question No. 3. In either event, can the change be made retroactively?

Answer: Yes. If the desire to do so is clearly expressed and if a public purpose supports retroactive effect. Please be advised, however, that the issue of retroactivity is not without risks. Briefly, there are actually two issues involved. The first, retroactivity, is fairly straight forward and easily accommodated. The second, gift of public funds, is not as precise. The case law in this area is ambiguous and uncertain.

Generally speaking, retroactivity is a matter of legislative intent. The seminal case on this issue is Aetna Cas. & Surety Co. v. Ind. Acc. Com., 30 Cal. 2d 388 (1947). In Aetna, the court reviewed a compensation award made to an employee pursuant to a section of the Labor Code that had been amended after date of the injury. Concluding that the Commission had improperly applied the amendment retroactively, the court reversed the judgment. In so doing, the court considered at length the Commission's argument that "procedural changes" could be applied retroactively. Rejecting this approach, the court concluded that the amendment to the Labor Code at issue was "substantive" in its effect because it "increased the amount of compensation above what was payable at the date of the injury, and to that extent it enlarged the

employee's existing rights and the employer's corresponding obligations." Id. at 392. "Since the industrial injury is the basis for any compensation award, the law in force at the time of the injury is to be taken as the measure of the injured person's right of recovery." Id.

Moreover, as discussed in our response to Question No. 1, "it is an established cannon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." Id. at 393. As recently articulated by our State Supreme Court, "it is a widely recognized legal principle, specifically embodied in section 3 of the Civil Code, that in the absence of a clear legislative intent to the contrary statutory enactments apply prospectively." Evangelatos v. Superior Court, 44 Cal. 3d 1188, 1193-1194 (1988).

Thus, the proposed retroactive effect of the proposed modification can be accomplished if this intent is clearly expressed. This is easily accomplished by inserting a statement in the ordinance enacting the proposed modification to the effect that its terms will be retroactive to a certain date. Assuming it is the desire of all concerned to redefine the term pre-existing condition and further that the amended definition apply retroactively, one additional issue must be addressed. That issue involves a determination as to whether the proposed modification involves a gift of public funds. In this regard, we note the California Constitution prohibits a gift of public funds for past services.

Specifically, article IV, section 17 of the California Constitution provides:

> The Legislature has no power to grant, or to authorize a city, county, or other public body to grant, extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or to authorize the payment of a claim against the State or a city, county, or other public body under an agreement made without authority of law. (Emphasis added.)

In addition, article XI, section 10 of the California Constitution provides further:

> (a) A local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or pay a claim

under an agreement without authority of law.
(Emphasis added.)

With the foregoing in mind, the issue becomes whether an award of a disability retirement based on a previously excluded but now included pre-existing medical condition which occurred during the time period during which there was no entitlement to such a benefit constitutes "extra compensation" within the meaning of the above-cited constitutional prohibition against a gift of public funds. Although we cannot predict with any degree of reasonable certainty how the courts will treat this issue, we feel that the courts could find the proposed modification not violative of the gift of public funds prohibition. However, there is sufficient ambiguity in the case law warranting caution in this area.

Generally speaking, "pension provisions do not provide for a gratuity but 'become a part of the contemplated compensation for those services and so in a sense become a part of the contract of employment itself . . . the right to a pension becomes a vested one upon acceptance of employment by an applicant.'" Holtzendorff v. Housing Authority, 250 Cal. App. 2d 596, 623 (1967).

Moreover, "by entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer." Carman v. Alvord, 31 Cal. 3d 318, 325 (1982). In this regard, members of the 1981 had no vested contractual rights to disability retirements. Depending on the date they joined the plan, there was either no disability retirement whatsoever or a disability retirement subject to the express exclusion for pre-existing medical condition. There is, however, a further proposition that provides that "a pension is a gratuity when it is granted for services previously rendered and which at the time they were rendered gave rise to no legal obligation." Lamb v. Board of Peace Officers, etc., 29 Cal. App. 2d 348, 350 (1938). This proposition raises our concerns. The proposed modification appears to fall squarely within this proposition because it purports to provide a pension for services previously rendered which at the time they were rendered gave rise to no legal obligation for payment of the pension. Id.

Lamb, however, dealt with a situation where a county motorcycle officer became totally and permanently disabled at a time when there was no retirement act in force applicable to him. In contrast, the pre-existing medical condition at issue here occurred when there was a retirement system (the 1981 Plan) in force. As such, if called upon to defend the proposed modification, we would argue that the proposed modification was not a new benefit but rather an increased benefit designed to harmonize the CERS and 1981 Plans. In this regard, the law is clear that "increased benefits to one already having a pensionable status are constitutional and economically appropriate." Sweesy v. L.A. etc. Retirement Bd., 17 Cal. 2d 356, 363 (1941). The difficulty with

this argument, however, lies in the characterization of the applicant seeking the benefit of the proposed modification. The applicant has not achieved the required pensionable status. He or she is seeking such status. As such, the holding of Sweesy is not on point. We do note, however, that the reasoning used by the California Supreme Court in Sweesy allowing retrospective application of a benefit change may provide assistance in your situation.

As noted in Sweesy:

> As in this case, the members of the system make contributions to the pension fund, even though contributions may also come from public funds. Such systems are usually founded on actuarial calculations. Therefore, the question of what benefits would be warranted by either the individual or mass contributions to the fund is for the legislative body, and not for the pension board or the courts, whose respective functions in such cases are to administer and interpret the provisions of the law as written.

Id. at 362.

In light of the foregoing, we feel that the retroactive application of the proposed modification of the definition of pre-existing condition will probably not constitute a gift of public funds. Support for this conclusion is found in recent pronouncements by the California Supreme Court where it is evident that the court has retreated from a literal interpretation of this constitutional prohibition. As noted by the court:

> Early decisions interpreting the extra compensation clause demonstrate that its framers had a particular, narrow objective in mind-an objective that would not be served by a literal reading of the clause in the present case. The primary purpose of the prohibition, as we pointed out not long after its adoption, was to prevent the Legislature from enacting "private statutes" in recognition of "industrial claims." Thus, we said, the provision "denied to the Legislature the right to make direct appropriations to individuals from general considerations of charity or gratitude, or because of some supposed moral obligation.

Jarvis v. Cory, 28 Cal. 3d 562, 577 (1980).

Finally, it is well-settled that the plan document is always

subject to amendment "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." Betts v. Board of Administration, 21 Cal. 3d 859, 864 (1978). In this regard,

> Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.

Id.

The proposed modification of the definition of pre-existing condition appears reasonable and rationally related to a theory of a pension system and its successful operation. In addition, the proposed modification is an advantage rather than a disadvantage. In light of the ambiguity in this area and also the unique situation and disparate treatment involved with disability retirements in the CERS and 1981 Plan, we feel that the proposed modification will not constitute an unlawful gift of public funds. In an abundance of caution, however, we recommend that the Board enunciate a public purpose for the retroactive application of the proposed modification.

In closing, please be advised that we have made no attempt to analyze any administrative concerns or burdens naturally resulting from the retroactive application of the proposed modification. We do note, however, that these concerns or burdens could be substantial. We have also not addressed the cost implications of this proposed modification. As such, you may wish to research the actuarial implications resulting from retroactive application of the proposed modification.

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
Loraine L. Etherington
Deputy City Attorney

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