MEMORANDUM OF LAW

DATE: November 24, 1993

TO: Larry B. Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Age 65 Retirement - Nonindustrial Disability Retirements

ISSUE

In a memorandum dated October 20, 1993, you ask whether a member who joined the San Diego City Employees' Retirement System ("SDCERS") prior to February 19, 1991, and who is age 65 or older with fewer than ten years of creditable service is eligible to apply for a nonindustrial disability.

SHORT ANSWER

No. Our analysis follows.

DISCUSSION

Apparently, this question is an outgrowth of advice rendered previously by this office concerning age 65 service retirements with fewer than ten years of creditable service. As you correctly note, until February 19, 1991, The City of San Diego ("City") had mandatory retirement at age 65. San Diego City Charter ("Charter") section 141.F
Effective February 19, 1991, Charter section 141 was amended to repeal this requirement.

Since this mandatory service requirement was in conflict with and preempted by federal law, members age 65 and older with fewer than the Charter required ten years of creditable service were allowed to retire on a prorated basis. The legality of these retirements was addressed in legal opinions dated August 1, 1991, November 7, 1991, and March 9, 1992.

In sum, those opinions discussed the requirements in Charter section 141 for ten year vesting and the former requirement of mandatory retirement at age 65 and the viability of these requirements in light of the Age Discrimination and Employment Act of 1986 (Public Law 99-592, 100 Stats. 3342 1986) (ADEA) and the United States Supreme Court Ruling in EEOC v. Wyoming, 460 U.S. 226 (1983). Simply stated, the enactment of the ADEA and the Supreme Court decision that compulsory retirements such as that formerly found in Charter section 141

were preempted by and controlling over local law, rendered the compulsory retirement requirement of Charter section 141 inoperative. The ten year vesting requirement was not affected by either the ADEA or the EEOC v. Wyoming decision.

When researching this issue further, we reviewed a series of opinions rendered by this office which discussed the various amendments from 1951 to 1954 to the compulsory retirement set forth in Charter section 141. Up until March 1951, Charter section 141 provided that "retirement shall be compulsory at the age of 72 years." Amended March 13, 1951, effective March 26, 1951, Charter section 141 provided for compulsory retirement at age 65 with the exception that the Manager or other department head could continue an employee in service beyond the age of 65 years up to but not beyond the age of 72. Op. City Att'y 54 (1951). Charter section 141 was amended again on June 8, 1954, effective January 10, 1955, to remove the provision for compulsory retirement at age 72. The compulsory retirement at age 65 as well as the authority for the Manager or department heads to retain employees beyond age 65 from year to year was retained. In a subsequent opinion, we opined that the amendments to Charter section 141 were to be applied prospectively only. Op. City Att'y 161 (1951).

A legal opinion dated August 6, 1956, authored by Aaron W. Reese, then Assistant City Attorney discussed the conflicting requirements in Charter section 141 for 10 years of service and compulsory retirement at age 65 and approved of prorated retirements under these limited circumstances. The analysis provided by Mr. Reese is as pertinent today as it was then. Addressing the then compulsory age 65 retirement he noted:

> This language conflicts with the earlier language in the same section, that "no employee shall be retired before he reaches the age of sixty-two and before he has completed ten years of continuous service." Even though this conflict exists, we are bound by the rules of statutory construction set out by the Legislature and the Courts. These rules require us to give effect to every part of the statute, if possible to do so. Therefore, to give effect to the compulsory retirement at age sixty-five requirement, this must be considered as a modification of the requirement

> that an employee must have completed ten years of continuous service. This, in turn, would mean that an employee who retired at age sixty-five would be entitled to a retirement allowance based upon his age and years of service at the time of such retirement regardless of length of service.

In light of the foregoing, we found no impropriety then or now in the Board's decision to approve retirements for those members age 65 with fewer than ten years of continuous service. With respect to the effective date of the repeal of the compulsory age 65 retirement (February 19, 1991), we further conclude as more fully discussed in our earlier opinions and pursuant to the authority in Betts v. Board of Administration, 21 Cal. 3d 859, 866 (1978) that the opportunity to retire at age 65 or older with fewer than ten years of service would be available to those members who were hired before February 19, 1991. Members hired after that date are required to meet the Charter-required ten years of service to receive a service retirement.

Turning to nonindustrial disability retirements, we note that the availability of these retirements have never been affected by the former compulsory age 65 retirement requirement. Although there is also a charter-imposed ten year requirement for the availability of this benefit, it is discussed separately in Charter section 141. As amended on March 13, 1951, effective March 26, 1951, Charter section 141 provided for nonindustrial disability retirement as follows:

The Council may also in said ordinance provide:

> . . . .
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> . . . .
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> (c) Retirement with benefits of an employee who, after ten years of service, has become disabled to the extent he or she is . . . not being capable of performing his or her assigned duties, or who is separated from City service without fault or delinquency on his or her part.

From its inception, nonindustrial disability retirements have only been available to those members meeting the ten years of service requirement. The former compulsory retirement at age 65 and its subsequent inoperability due to the enactment of the ADEA had no effect on the service requirements for the

nonindustrial disability retirement benefit. Specifically, the service requirement for a nonindustrial disability retirement is not age-based and therefore does not trigger any violation of the ADEA. As such, nonindustrial disability retirements have been and should continue to be restricted to those members who have met the ten years of service requirement found in Charter section 141(c).

CONCLUSION

The availability of a nonindustrial disability retirement is restricted to those members who meet the ten years of service requirement found in Charter section 141(c). The award of prorated service retirements for those members age 65 with fewer than ten years hired before February 19, 1991, does not change this result.

Please let me know if I can be of further assistance.

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By
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Deputy City Attorney

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