

MEMORANDUM OF LAW

DATE: December 8, 1993

TO: Patrick Lane, Retirement Analyst, via Larry B.
Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Disability Benefit Distribution Upon Dissolution

You requested guidance in dividing disability pensions when the employee has been divorced from his or her spouse, and you requested particular guidance for the questions posed by a particular retiree regarding the division of his pension. Those questions from the individual retiree have been answered in a separate letter which you have already reviewed.

Under California law, disability pension benefits are separate property, until the employee reaches retirement age. Before retirement age, disability retirement payments are separate property and should be paid solely to the member. After retirement age, the amount of pension which one would receive for a service retirement is community property, and any excess amount is separate property. However, an individual's domestic relations court order may change the general rule. San Diego City Employees' Retirement System ("SDCERS") is bound by the court order in each case, if it varies from the general rule.

At retirement age, the pension benefits which the member would have received for a service retirement are community property, regardless of whether they are called disability benefits or service retirement benefits. In re Marriage of Stenquist, 21 Cal. 3d 779 (1978); In re Marriage of Samuels, 96 Cal. App. 3d 122 (1979); In re Marriage of Pace, 132 Cal. App. 3d 548, 553 (1982). If the disability payments are higher than the amount of service retirement pay would be, then the excess amount is still characterized as a disability benefit and is the sole property of the member.

An interesting case is In re Marriage of Higinbotham, 203 Cal. App. 3d 322 (1988). There, a police officer had a choice between a disability pension and a service pension, each paying exactly the same monthly benefit. The officer chose the disability retirement because it was tax exempt, yielding \$400 more per month as a net benefit than the service retirement

provided.

The Court of Appeal found that the value of the tax exemption was separate property. In re Marriage of Higinbotham, 203 Cal. App. 3d at 332. The officer received a larger benefit from the disability pension than he would with the service benefit, even though the gross amount payable was the same under either plan. That excess benefit, the value of the tax deduction, was separate property and not subject to division with the ex-spouse.

Under this case, if a SDCERS member retires on a disability retirement when he is eligible for a service retirement, and if the court order specifies that disability retirement benefits are separate property, SDCERS should ask the retiree to demonstrate the value of the tax benefit of the disability retirement over a service retirement. This amount should be allocated to the member, and then the community property division percentage should be applied to the remaining amount.

However, and this is a big caveat, the general rules of law can be modified by the parties themselves. We are bound by the terms of the dissolution orders, as long as those orders conform to our plan.

In most cases, the domestic relations orders require SDCERS to give a certain percentage of the "retirement benefits" to the ex-spouse. When the order does not make a distinction between a service retirement and a disability retirement, we should follow the plain language of the order and treat all retirement benefits the same, whether they arise from a disability retirement or a service retirement. If the order specifies that a disability payment is separate property, then SDCERS must determine if the disability benefit, including favorable tax treatment, exceeds the amount of a service retirement pension, and if so, give the excess to the member only. The burden of determining the value of favorable tax treatment should be placed squarely on the shoulders of the member, as SDCERS cannot calculate tax benefits for individual members.

CONCLUSION

In dividing pension benefits after a dissolution, SDCERS should be guided by the plain language of the domestic relations order. If the domestic relations order specifies that a disability pension is separate property, then it should be paid solely to the member until the member reaches retirement age. At retirement age, SDCERS should apply the percentage due to the ex-spouse only to the amount which would be payable for a service retirement benefit, if that is less than the amount of disability benefit. If the amount of the service benefit is equal to the amount of the disability benefit, the value of favorable tax

treatment on the pension may be calculated by the member, and that amount may be given directly to the member before determining the percentage due to the ex-spouse.

When the domestic relations order does not distinguish between disability and service retirements, but simply awards a certain percentage of "retirement benefits" to the ex-spouse, then SDCERS should pay to the ex-spouse that percentage of the pension benefit, regardless of whether the pension is characterized as a disability pension or a service pension.

Please feel free to call me if you wish to discuss this further.

JOHN W. WITT, City Attorney

By

Meagan J. Beale

Deputy City Attorney

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