

MEMORANDUM OF LAW

DATE: December 15, 1993

TO: Larry B. Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Retirement Board's Authority to Set Salaries for
Unclassified Retirement System Personnel

In a memorandum dated October 20, 1993, you refer to recent amendments to the California Constitution occasioned by the adoption of the California Pension Protection Act ("Proposition 162") and City Attorney Opinion 92-2 and request a review of the Board's authority to set salaries for the System's unclassified staff, namely for the positions of Administrator, Assistant Administrator and Investment Officer, in light of this or other relevant authority. In subsequent conversations, you also request a review of the requested but as of yet unprocessed salary increase for the former Assistant Administrator and the salary increase recently approved by the Board for your position as Administrator. In our view, the annual salary ordinance of The City of San Diego ("City"), Ordinance No. 0-17915, adopted on May 25, 1993, governs the resolution of your request. Under the facts submitted for our review, Proposition 162 does not alter this conclusion. Our analysis follows:

**THE BOARD HAS THE AUTHORITY TO SET THE COMPENSATION FOR THE
RETIREMENT SYSTEM'S UNCLASSIFIED PERSONNEL**

The City's salary ordinance establishes and governs the compensation paid to all personnel of the City, classified and unclassified. Section 4 of this ordinance speaks to the schedules of compensation established for the Executive, Managerial and Miscellaneous Executive and Managerial Categories of Unclassified Service. A Table of Pay for Standard Rates indicating biweekly salaries, and containing minimum, maximum and intermediate range steps for each Standard Rate has been established and adopted for these positions as set forth in Exhibits A and C to the ordinance.

Section 7 addresses the determination of compensation for both classified and unclassified personnel. It provides that "compensation for all officers and employees in the Unclassified Service listed in Exhibit C, shall be determined and

set by the appropriate appointing authority at any one of the range or incremental steps of the Standard Salary Rate numbers attached to the position." With respect to the Retirement System, either the Board or its delegatee, the Administrator, is the appointing authority. The Board sets the compensation for the Administrator. The Administrator, in turn, sets the compensation for the Assistant Administrator and Investment Officer.

The Board's authority in this regard flows from the Charter of The City of San Diego ("Charter"). Pursuant to Charter section 144, the Board is vested with the authority to manage the System, to administer the benefits and to invest the System's trust fund. To assist the Board in fulfilling its charter responsibilities, Section 144 further vests the Board with the authority to appoint a Secretary and such other employees as may be necessary. The only enumerated restriction upon the Board's appointment powers is the further provision that such appointments (other than the actuary) be made under the Civil Service provisions (Article VIII) of the Charter.

Currently, three such appointments (Administrator, Assistant Administrator and Investment Officer) have been made. Each appointment has been made to a position in the Unclassified Service as referenced in Charter section 117. Each position assists the Board in performing its Charter responsibilities. With respect to the Administrator, the Board has specifically delegated to him the responsibilities of oversight, supervision and salary adjustments for the unclassified positions under his immediate control.

With respect to salary adjustments for these unclassified positions, the annual salary ordinance provides further guidance. Section 7 provides that the appropriate appointing authority may grant increases within the range limits of the Standard Salary Rate number attached to the position upon the basis of seniority, efficiency, and merit. Under this section, the Board has the authority to revise the salaries of the unclassified staff. The Administrator has the authority to revise the salaries of either the Assistant Administrator or the Investment Officer.

Before turning to the specific salary adjustments for the Administrator and Assistant Administrator positions, however, a brief comment on the effect of Proposition 162 is in order. As you are aware, Proposition 162 amended Article VI, Section 17 of the California Constitution to give retirement boards overseeing public pension plans (such as the City's Retirement System) "plenary authority and fiduciary responsibility for the investment of moneys and administration" of those public systems.

In our view, the plenary authority given to the Board to

administer the system includes the ultimate authority to set and revise compensation levels for those employees not subject to the Civil Service provisions of the Charter. To this extent, the procedures set forth in the annual salary ordinance govern. With respect to those classified employees covered by the City's Civil Service provisions, we note that, absent any showing that the application of those provisions unreasonably curtails or impairs the Board's ability to fulfill its constitutionally mandated fiduciary duties (such as the duty to deliver benefits promptly), those rules should stand and govern accordingly.

With the foregoing principles in mind, we now turn to the salary adjustments for the Administrator and Assistant Administrator, respectively.

THE SALARY INCREASE FOR THE ADMINISTRATOR

The Board, at its regularly scheduled meeting of October 15, 1993, approved the recommendation made by the Business and Procedures Committee to increase the Administrator's salary by 7.5%, retroactive to July 1, 1993. The motion passed with nine board members in favor and two board members opposed to the recommendation. The issue of retroactivity of the increase was referred to our office for review.

After reviewing the Board approved 7.5% increase for the Administrator, in light of the Salary Tables for the current Salary Ordinance and Charter section 144, we find the increase to be a lawful exercise of the Board's authority to revise the Administrator's compensation. According to the annual salary ordinance, the recommended increase falls within the acceptable range limits for this position. According to Exhibit C of the annual salary ordinance, the Retirement Administrator position is classified as Miscellaneous A under the "Other Miscellaneous Executive and Managerial" category with a salary range of 05.5, 05.6, 05.7 and 05.8. It is our understanding that the 7.5% increase places the Administrator within this range at Rate 5.8, step M, Executive Salaries. With respect to the issue of retroactivity, however, we find no legal support.

Article XI, Section 10 of the California Constitution expressly precludes the granting of extra compensation to a public employee after service has been rendered and performed in whole or in part by the employee. Absent a factual showing that the public employee was entitled to a higher level of compensation during the period in which the services were performed, it would be unlawful to grant or process a retroactive salary increase.

In the present case, the Board approved a salary increase for the Administrator on October 15, 1993. The Board had the authority to take this action. Although the Board also indicated

its desire to make the increase retroactive to July 1, 1993, it had no authority to do so under the facts reviewed. Simply stated, the Administrator had no entitlement to a higher salary before October 15, 1993. The entitlement to the increase began on October 15, 1993, the date on which the Board took official action to increase the Administrator's salary. Under these circumstances, we find no constitutional infirmities with a salary increase effective October 15, 1993.

THE SALARY INCREASE FOR THE FORMER ASSISTANT ADMINISTRATOR

In August, 1993 the Administrator submitted a payroll change notice to increase the salary of the Assistant Administrator, retroactive to July 30, 1993, the first day of that pay period. The increase requested fell within the appropriate range limits for this position. According to Exhibit C of the annual salary ordinance, the Assistant Retirement Administrator position is classified as Miscellaneous C with a salary range of 03.5, 03.6 and 03.7. Specifically, the Administrator requested that the Assistant be moved from Rate 3.6, Step R, Executive Salaries, to Rate 3.7, Step H, Executive Salaries. The requested salary increase was never implemented.

In a memorandum dated September 7, 1993, the Personnel Director informed the Administrator that the payroll change notice submitted by the Administrator should be augmented by additional information prior to being processed. Concerns were expressed over the lack of explanation for the retroactive nature of the requested salary increase. In addition, the Personnel Director indicated the existence of a citywide salary policy which required that every request for an exemption from that policy be accompanied by specific justification before implementation of the salary increase. The Administrator responded in a memorandum dated September 22, 1993. According to that memorandum, the Administrator submitted the requested salary increase based on a variety of factors including:

1. The Assistant Administrator's outstanding performance.
2. The fact that the Assistant Administrator had not received any salary increases (other than normal cost of living increases granted to all City employees) since assuming the position in September, 1990.
3. The lack of salary parity with the newly created position of investment officer.
4. The Administrator's failure to address the salary parity issue at the time the Investment Officer's position was established due to the Assistant Administrator's contemporaneous approved three

- month leave of absence.
5. The Administrator's decision to delay the processing of the salary increase (in light of a further stiffening of the City's policies regarding salaries of unclassified employees) until he could review the increase with the President and Executive Committee of the Board.
 6. The fact that the requested salary increase would have no impact on the general fund budget because the Retirement System is a non-managerial and a non-general fund department.
 7. The Administrator's representation of an implicit promise to the Assistant Administrator regarding the salary increase.

On September 21, 1993, a note to the Administrator from his payroll clerk indicated that the salary increase for the Assistant Administrator had been denied pursuant to a communication from the Auditor's office. In subsequent conversations, personnel in the Auditor's office indicated that the salary increase could not be processed until approved by the Personnel Department. The Personnel Director indicated that the request would be processed upon receipt of a memorandum containing all of the circumstances regarding the requested salary increase, including the fact that the Assistant Administrator was leaving (and, in fact, has left) City employment.

In our view, the memorandum dated September 22, 1993, contains the circumstances underlying the requested salary increase. The request to increase the former Assistant Administrator's salary should be processed effective July 30, 1993. We find the July 30, 1993, effective date appropriate for several reasons. First, the appointing authority has the authority to request a salary increase mid pay period, effective to the first day of that pay period. Second, the Administrator has indicated that the July 30, 1993, date is the first date on which the Assistant Administrator expected a salary increase.

The fact that the Assistant Administrator has since left City employment is of no consequence. She was entitled to the increase before she left. She provided services with the expectation that she would receive the higher level of compensation promised to her. In fact, the initial time sheet records processed after the salary request was submitted reflect the increase and the additional sums owed to her. Under these circumstances, a salary increase effective July 30, 1993, is appropriate.

CONCLUSION

With respect to the salary level for the Administrator position, the Board has the authority to set and revise the compensation. With respect to the positions of Assistant Administrator and Investment Officer, the Board has delegated this responsibility to the Administrator. The Administrator also has the authority over the compensation levels of the Assistant Administrator and Investment Officer by virtue of his position as a department head of the Retirement Department.

In light of the foregoing, the salary increase for the Administrator approved by the Board should be implemented effective October 15, 1993. The salary increase for the former Assistant Administrator should be implemented effective July 30, 1993.

Please contact me if we can provide any additional assistance.

JOHN W. WITT, City Attorney

By

Loraine L. Etherington

Deputy City Attorney

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