MEMORANDUM OF LAW

DATE: July 30, 1993

TO: Board Rules Subcommittee

FROM: City Attorney

SUBJECT: Board Rule Revisions

On March 19, 1993, the Retirement Board ("Board") authorized the creation of a subcommittee ("Subcommittee") for the purpose of restructuring and revising the Rules of the Retirement Board ("Rules"). The Subcommittee has met several times and is prepared to bring the first two Divisions of revised Rules back to the Board for tentative approval, pending a review by the City Attorney.

At the July 9, 1993, meeting of the Subcommittee, chairperson Ron Saathoff asked the City Attorney to carefully scrutinize the proposed Rules to ensure harmony and consistency with the San Diego Municipal Code ("SDMC"), the City Charter ("Charter") and the Pension Protection Act of 1992 ("Proposition 162"). Mr. Saathoff specifically requested that we elaborate upon those rule revisions which were discussed at length and sparked lively debate among members of the Subcommittee. The general legal principles relevant to analyzing the issues raised by the Subcommittee are outlined below.

STANDARD OF REVIEW

I. THE ADMINISTRATION OF SDCERS IS A MUNICIPAL AFFAIR

The establishment and regulation of employee pensions in charter cities is considered a municipal affair within the meaning of the home rule provisions of the California Constitution. Grimm v. City of San Diego, 94 Cal. App. 3d 33, 37 (1979). Generally speaking, this means that charter cities are assumed to possess the power to regulate in this area and are free to legislate, subject only to express limitations contained in their city charters. City of Grass Valley v. Walkinshaw, 34 Cal. 2d 595 (1949).

You should be aware that after the passage of Proposition 162, which amended Section 17 of Article XVI of the Constitution, charter cities may no longer have complete freedom to regulate in all areas related to administration of public pension systems. Where Article XVI of the Constitution now contains an express

limitation on the exercise of municipal power to regulate pension matters, and where that limitation is contrary to a provision in the Charter or SDMC, the Charter or SDMC is preempted. The constitutional limitation must be an express limitation on the exercise of power because when courts interpret a law which purports to divest charter cities of power in an area traditionally considered a municipal affair, they will naturally lean toward a construction in favor of the exercise of charter municipal power and against the existence of any limitation or restriction which is not expressly stated. See, e.g., City of Grass Valley, 34 Cal. 2d at 599.

II. THE COUNCIL EXERCISES LEGISLATIVE POWER - THE BOARD EXERCISES ADMINISTRATIVE POWER

The Board is established pursuant to section 144 of the Charter as an quasi-independent administrative body with rulemaking powers. Charter section 144 states that "the Board of Administration may establish such rules and regulations as it may deem proper." Likewise, SDMC section 24.0901 states that the Board may "make such rules and regulations as it deems proper for the administration of the Retirement System."

Although at first glance it may appear that the Board has great latitude to create rules regarding the administration of the San Diego City Employees' Retirement System ("SDCERS"), in actuality, the Board's rulemaking power is quite limited. The Board is not a legislative policymaking body capable of creating law. In fact, all legislative powers of the City, except such legislative powers as are reserved to the people by the Charter and the California Constitution, are vested in the City Council. See, Charter section 11. The Council may not delegate its legislative power. Charter section 11.1. Most importantly, in Charter section 27, the people have reserved the power of referendum over all legislative acts. Referendum is not a right granted to the people but a power reserved by them; it is jealously guarded and liberally construed. Ortiz v. Board of Supervisors, 107 Cal. App. 3d 866, 870 (1980). The people of San Diego have a vested interest in ensuring that legislative acts are properly noticed and codified into the SDMC.

In short, the Board may adopt Rules which can be classified as administrative acts, the Board may not adopt Rules which amount to legislative acts. The courts of this state have struggled to resolve the inevitable disputes which have arisen over "the vague, legislative-administrative dichotomy." Hughes v. Lincoln, 232 Cal. App. 2d 741, 744 (1965). "This legislative-administrative dichotomy reflects a determination to balance the ideal of direct legislation by the people against the practical necessity of freeing municipal governments from time consuming

and costly referenda on merely administrative matters." Fishman v. City of Palo Alto, 86 Cal. App. 3d 506, 509 (1978).

In any given circumstance, the facts of the situation and the existence or non-existence of enabling legislation will help determine whether an action is legislative or administrative in character. Generally speaking, courts tend to view legislative acts as those which create new public policy by declaring a public purpose and making provisions for the ways and means of its accomplishment. Administrative acts are viewed as those which are necessary to carry out the legislative policies and purposes already declared by the legislative body. See, e.g., Merriman v. Board of Supervisors, 138 Cal. App. 3d 889 (1983).

III. THE BOARD'S RULEMAKING POWER IS RESTRICTED BY EXPRESS LIMITATIONS IN SUPERIOR LAWS

The Board's power to create rules is also restricted by express limitations contained in the various superior laws governing SDCERS. In descending order of precedence, these laws include federal laws, the California Constitution, the Charter and the SDMC. The Board is free to adopt administrative procedures and rules which fall within the purview of "administration of the system," so long as the Board is not expressly precluded from doing so by some other law. In other words, the Board may adopt rules which complement and implement the substantive provisions of law which are mandated upon SDCERS.

ISSUES AND ANALYSIS

Issue No. 1: Board members are trustees of the Retirement Trust Fund held to a strict standard of fiduciary accountability. Yet, if it were established that a Board member had seriously breached his or her fiduciary duty, the Charter and SDMC are silent with respect to the removal for cause and replacement of that Board member. Recognizing this, the Subcommittee has asked whether it can adopt Rules establishing fiduciary standards of conduct for Board members and also adopt a process to censure or ultimately remove another Board member who has violated these Rules?

Answer: An argument could be made that Proposition 162 requires a vote of approval from the citizens of San Diego before the Board or the Council could even specify a process for the removal of Board members. The pertinent provision in Article XVI, Section 17 of the Constitution reads as follows:

> (f) With regard to the retirement board of a public pension or retirement system which includes in its composition elected employee members, the number, terms, and method of selection or removal of

> members of the retirement board which were required by law or otherwise in effect on July 1, 1991; shall not be changed, amended, or modified by the Legislature unless the change, amendment, or modification enacted by the Legislature is ratified by a majority vote of the electors of the jurisdiction in which the participants of the system are or were, prior to retirement, employed.

In City Attorney Opinion 92-2 we opined, and we continue to believe, that the word "Legislature" as used in this provision and throughout Article XVI means the California Legislature, consisting of the Senate and Assembly. (See generally, California Constitution, Article IV.) Thus, in our view this section is of no relevance to the issue raised by the Subcommittee.

Clearly, it would be a permissible administrative act and not a legislative act for the Board to adopt Rules establishing fiduciary standards of conduct for Board members. Nothing in the SDMC or Charter would expressly preclude the Board from doing so. Likewise, it would probably be safe to characterize the adoption of a Rule establishing a process for addressing fiduciary misconduct and censure of Board members as an administrative act. However, we feel compelled to draw the line at this point.

Charter section 144 and section 1 of Article X contain specific language describing the composition of the Board and the length of term of service for Board members. The City Council appoints four (4) members to the Board, three (3) City officers are designated to sit on the Board (the Manager, the City Auditor and the City Treasurer) and the remaining six (6) seats on the Board are elected from the various classes of membership in SDCERS. As mentioned above, the Charter is silent on removal of Board members.

The general rule, long recognized in common law, is that a municipal officer appointed for a definite term may only be removed from office for cause by the appointing authority. 4 McQuillin, Municipal Corporations Section 12.249 (1992). An elected officer may only be removed from office for cause by the electorate. Id. The rationale for these rules is that, absent specific authority for removal of an officer, the power of removal is regarded as incidental to the power of appointment or election. Any Rule which would permit the Board to remove a Council appointee, an ex-officio member or an elected Board member is thus susceptible to attack as an ultra-vires

legislative act on the part of the Board. The Board would be inappropriately usurping powers exclusively vested with the appointing authority or the electorate.

Thus, in the case of appointed or ex-officio Board members, the Board's power in seeking removal of that officer is ostensibly limited to bringing the matter to the attention of the appointing authority. The appointing authority is the City Council in all cases except for the Treasurer. The City Manager is the appointing authority for the Treasurer, as provided in Charter section 45. The fact that appointments of persons to office may require the approval or confirmation of another tribunal, like the City Council, does not mean that the latter must concur when the power of removal is exercised by the appointing authority. 4 McQuillin, Municipal Corporations Section 12.233.10 (1992).

Lastly, with respect to an elected Board member, if the Board determines that an elected Board member is no longer fit to serve because of "willful or corrupt misconduct in office," pursuant to Government Code section 3060 et. seq., the Board could present a written accusation to the County Grand Jury which in turn has the authority to deliver the accusation to the District Attorney for prosecution. If found guilty, the Court is required to pronounce judgment that the defendant be removed from office. Government Code section 3072.

Issue No. 2: The Charter specifies that the Board "shall elect one of its members president." The SDMC is silent on the issue. The Subcommittee has asked whether the Board, by its own Rule, can preclude ex-officio members or elected members involved in the meet and confer process from holding office on the Board?

Answer: Yes. In our opinion, adoption of such a Rule could be classified as an administrative action of the Board. The action falls within the authority granted to the Board in SDMC section 24.0901 to administer the system and the Board would still be "electing" a president as required by the Charter.

Issue No. 3: The Charter describes the composition of the Board to be the City Manager, the City Auditor and Comptroller, the City Treasurer, three (3) members of the Retirement System to be elected by the active membership, one (1) retired member, four (4) Council appointees, a Fire Safety Member representative and a Police Safety Member representative. The Subcommittee has asked whether the Board can adopt a rule which precludes a member from running for election to the Board if another person from that candidate's City Department is already sitting on the Board?

Answer: No. Under the Charter, members and retirees are empowered with the right to elect representatives to the Board and the right to vote on plan amendments which affect the vested

benefits of the membership class. See, Charter sections 143.1, 144. In our opinion, it could be construed as contrary to the Charter for the Board to abrogate or limit the voting rights of the membership. The Rule presently in effect does just that by precluding a Board candidate from even having his or her name appear on the ballot if certain criteria of the Board are not satisfied. Although the Rule 8 presently in effect is grounded in a well meaning intention to promote City departmental diversity on the Board, our considered opinion is that the Rule would not survive a court challenge. We advise you to repeal the Rule.

Issue No. 4: Pursuant to Charter section 144 and section 1 of Article X, there are thirteen (13) members on the Board. Presently, SDMC section 24.0901.1 and Board Rule 10 require a nine (9) member quorum for the Board to conduct a meeting, with an affirmative vote of seven (7) members to take any action. For purposes of convenience, the Subcommittee has asked whether the SDMC can be amended to establish a seven (7) member quorum, with the same seven (7) member vote requirement?

Answer: Yes. At the request of the Board, the Council is free to exercise its legislative prerogative to change the quorum requirement. If the full Board tentatively approves the recommendation of the Subcommittee on this issue, we suggest the Board sponsor the following amendment to SDMC section 24.0901.1 for the Council to consider and act upon.

SEC. 24.0901.1 Meetings; Quorum

Nine (9) Seven (7)} of the members elected and appointed to the Board pursuant to Section 144 of the Charter shall constitute a quorum to do business or conduct a hearing but a lesser number may take action to adjourn a meeting or hearing from time to time. The affirmative vote of a majority of the Seven (7)} members elected and appointed to the Board shall be necessary to pass any vote and take final action on any decision before the Board except that a vote to adjourn may be adopted by a majority of the members present.

Issue No. 5: Charter section 144 designates the City Manager, the City Auditor and Comptroller and the City Treasurer as ex-officio members of the Board. Due to time constraints and other priorities associated with his office, the City Manager has routinely designated the Director of the Risk Management

Department to attend Board meetings on his behalf. The City Auditor and Comptroller and the City Treasurer also find it necessary to occasionally send their principal Assistants to Board meetings. The Subcommittee has questioned the legality of this practice.

Answer: We find nothing legally improper. Since at least the early 1950's, the City Manager has been sending a designated representative to Board meetings. The legality of this practice has been questioned before and this office has opined that pursuant to Charter section 27, it is not inappropriate for the City Manager to send a designee to act in his capacity at Board meetings. See, attached correspondence from City Attorney to Retirement Officer C.M. Sullivan, dated June 1, 1956.

Please observe that without going through any analysis and without citing to any authority, the City Attorney in the 1956 letter opinion cited above concluded that the City Auditor and the City Treasurer could not designate a substitute to attend Board meetings for them. However, today, upon thoroughly researching the issue, and for the reasons stated below, we arrive at a different conclusion and expressly overrule that portion of the 1956 opinion related to the City Auditor and City Treasurer.

The following excerpt from McQuillin, Municipal Corporations describes the essential nature of a public office.

> An office has been defined as a place in a governmental system created, or at least recognized, by the law of the state, to which place certain permanent public duties are assigned, either by the law itself or by regulations adopted under the law by an agency created by it and acting in pursuance of it. The right to hold office is not a natural right, nor a constitutional right, but must be granted by law, and the functions of the office are controlled by the will of the people as expressed in the laws relating to it . . . . An office is an entity and may exist in fact though it is without an incumbent . . . .

3 McQuillin, Municipal Corporations Section 12.29 (1990).

It is extremely common, and for all practical purposes a necessity, for large municipal corporations to grant power to public officers to appoint subordinate officers and deputies.

Again, here is an excerpt from McQuillin, Municipal Corporations.

> One who is authorized by an officer to exercise the office or rights which the officer possesses, for and in place of the latter, is generally said to be a deputy . . . . he or she is one who, by appointment, exercises an office in another's right, having no interest in the office, but doing all things in the principal's name, and for whose misconduct the principal is answerable.
>
> Since the deputy possesses, generally speaking, all the powers of the principal, the deputy is not equivalent to a mere assistant. And being authorized to act for and in place of the principal, the deputy is a public officer. If the law does not authorize one holding a position to do so, one is not a deputy but a mere employee.

3 McQuillin, Municipal Corporations Section 12.33 (1990).

SDMC section 22.0701 describes the powers and authority of the City Auditor and states in pertinent part as follows: "The City Auditor and Comptroller, or his duly authorized deputy, shall, at any time, have power to examine, check and audit the accounts and records of any commission, board, department, division, office, or employee of the City." (Emphasis added.) This provision of the SDMC clearly gives the City Auditor the ability and power to authorize a deputy to act in his place. When Joe Lozano, the Assistant Auditor and Comptroller, sits at Board meetings for the City Auditor, in the eyes of the law he is a designated deputy of the City Auditor.

Likewise, in the case of the City Treasurer, Charter section 45 authorizes the Treasurer to appoint "subordinate officers and employees." When Jack Sturak, the Assistant Treasurer, is designated by the City Treasurer to sit at a Board meeting, at that time he is a "subordinate officer" acting in the capacity of City Treasurer exercising the same rights and privileges which attach to the office.

It should be noted that nothing in general trust law precludes the reasonable delegation of the duties of a trustee as mandated by a trust instrument. However, "in a case where a trustee has properly delegated a matter to an agent, cotrustee,

or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter." Probate Code section 16012(b).

We are mindful of the fact that members of the Board who are appointed by the Council or elected to office are also public officers in their own right. However, they do not have the same legal power granted to them by the Charter or SDMC to designate a "subordinate officer" or "deputy" to act on their behalf. And as previously stated, the functions of any office are controlled by the will of the people as expressed in the laws relating to it.

Please contact me if you need further clarification of our opinion on these issues or if you have additional questions.

JOHN W. WITT, City Attorney
By
Richard A. Duvernay
Deputy City Attorney

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