MEMORANDUM OF LAW

DATE: September 14, 1993

TO: Jan Beaton, Benefits Counselor, via Larry Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Disability Retirements - Standard of Review - Board Rule 17

You have brought issues to our attention with respect to three pending disability applications. Each issue involves the nature and character of the duties being performed by the applicant just prior to retirement and how that impacts entitlement to an industrial disability benefit. Thus, we feel they are closely enough related to address together in this one memorandum.

ISSUES

Situation 1: On July 22, 1993, a board adjudicator hearing was conducted in connection with the disability retirement application of Sheila Burns. According to the testimony of Port District Benefits Coordinator Cheryl Gray, Ms. Burns was re-assigned in early 1991 to a light duty position within the Harbor Police Department because of medical limitations. In May of 1991, Ms. Burns ceased coming to work and subsequently applied for an industrial disability retirement. Ms. Gray testified that a light duty position is still available for Ms. Burns as an office assistant at the Port District's Chula Vista facility. Ms. Burns is presently in a leave without pay status.

At the conclusion of the hearing, the board adjudicator, Robert C. Neal, questioned the applicability of a provision in Board Rule 17 which purports to preclude the granting of a disability retirement if a suitable alternative position is available to the applicant within City service. The hearing officer has taken the matter under submission and is awaiting our comment on this issue.

Situation 2: Subsequent to your memorandum requesting our opinion on situation 1, you brought a similar case to our attention involving the pending disability application of James E. Stuart. Mr. Stuart, a police officer, was re-assigned in July 1987 to a light duty position as a Station Duty Officer at

Northern substation because of cardiovascular medical limitations. On February 27, 1990, Mr. Stuart ceased coming to work and subsequently applied for an industrial disability retirement. From February 27, 1990 until May 14, 1991, the light duty position Mr. Stuart had vacated was still available for him. However, since May of 1991 and continuing to the present day, no light duty positions have been available with the Police Department for Mr. Stuart.

A Board Adjudicator hearing was conducted in Mr. Stuart's case on March 9, 1993. On July 27, 1993, Board Adjudicator Betty Boone issued her Findings of Fact and Recommended Decision. Relying primarily upon Board Rule 17, Board Adjudicator Boone recommended that the Board of Administration ("Board") deny the application of Mr. Stuart. On August 30, 1993, Mr. Stuart submitted written objections to the Board Adjudicator's recommendation and on August 31, 1993, you brought this matter to our attention for review and comment.

Situation 3: On August 20, 1993, the Board considered the Proposed Findings of Fact and Decision of Board Adjudicator John S. Einhorn in connection with the industrial disability application of William Flohr. Board Adjudicator Einhorn found that Mr. Flohr had failed to sustain his burden of proving that his disability (knee injury) precluded him from performing the full range of activities required of a Battalion Chief in the Fire Department. The board adjudicator noted that Mr. Flohr had worked as a Battalion Chief with the claimed disability from 1987 until his retirement in 1988.

At the August 20, 1993, meeting of the Board, a concern was raised about the standard of review used by Board Adjudicator Einhorn in this case, particularly his reliance upon Mr. Flohr's post-injury work history as circumstantial evidence tending to show that he was capable of performing the duties associated with being a Battalion Chief. A motion was passed by the Board to refer the matter back to the Board Adjudicator to re-evaluate the case.

ANALYSIS

The San Diego City Employees' Retirement System ("SDCERS") is governed by a complex hierarchy of regulatory authority which includes, in descending order of precedence: the California Constitution ("Constitution"), the Charter of the City of San Diego ("Charter"), the San Diego Municipal Code ("SDMC") and the Rules of the Board of Administration ("Board Rules").

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 SDCERS, in reality, 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 are reserved to the people by the Charter and the California Constitution, are vested in the City Council. See, Charter section 11. The City Council may not delegate legislative power. Charter section 11.1.

An important legislative power vested by the Charter exclusively with the City Council is the power to define retirement benefits, including disability retirement benefits. Charter section 144 provides that "The Board of Administration shall be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system." (Emphasis added.)

Although the Constitution is not relevant to this analysis, simply because no provision of the Constitution purports to affect the ability of SDCERS to define the conditions which establish entitlement to a industrial disability retirement, it is critical to note at the outset of this memorandum that the Constitution, the Charter and the SDMC do share something in common which make them distinguishable from the Board Rules. Together, the Constitution, the Charter and the SDMC constitute the laws which make up the "plan document" or the "trust instrument" which the Board is obligated to administer as trustees. The Board Rules, on the other hand, are not laws at all, but merely standards to guide in the administration of SDCERS.

I. Elements Required to Establish Entitlement to an Industrial Disability Retirement

Pension rights, whether in the nature of service or disability benefits, are considered part of compensation, serve as incentives toward public service, and vest at the time of employment. Roccaforte v. City of San Diego, 89 Cal. App. 3d 877, 885 (1979). It is typical for a vested pension right to be defined by law, but remain unenforceable or unmatured until the occurrence or nonoccurrence of one or more conditions precedent. Id. at 886 (quoting Dickey v. Retirement Board, 16 Cal. 3d 745 (1976)). As is the case with nearly all pension benefits, the burden of proof rests with the applicant to establish the occurrence or non-occurrence of the conditions necessary to

establish entitlement to an industrial disability retirement. See, Lindsay v. County of San Diego Ret. Bd., 231 Cal. App. 2d 156 (1964).

The conditions precedent for establishing entitlement to an industrial disability retirement from SDCERS is set forth in Charter section 141 and SDMC section 24.0501. Before addressing the issues raised in any of the pending disability applications or commenting upon the applicability of Board Rule 17 or Board Rule 17b, we must first examine the substantive elements of an industrial disability retirement benefit as set forth in the Charter and the SDMC.

A. Charter Section 141

In Charter section 141 the citizens of San Diego have delineated the scope of legislative power vested in the City Council with respect to establishing industrial disability retirement benefits for City employees. Section 141 of the Charter reads in pertinent part:

> The Council may also in said ordinance provide:
>
> (a) For the retirement with benefits of an employee who has become physically or mentally disabled by reason of bodily injuries received in or by reason of sickness caused by the discharge of duty or as a result thereof to such an extent as to render necessary his retirement from active service.

The use of the discretionary word "may" in this provision of the Charter indicates that the City Council has the discretion to create an industrial disability retirement benefit. However, if the benefit is established, sub-section (a) of Charter section 141 sets forth the scope of the benefit with a fair degree of specificity in two important respects. First, to qualify for an industrial disability retirement benefit, the Charter mandates the existence of a causal link between the disability and the workplace. In addition, the disability must be of such a magnitude or character that it forces the employee to retire from active service. In other words, there must also be a causal link between the disability and the act of separating from active service with the City.

No court has ever issued a written opinion interpreting sub-section (a) of Charter section 141. However, there does exist an entire line of cases interpreting similar public sector plan provisions from other jurisdictions, most arising in the context of disability applications filed after re-assignment of

an employee to a light duty position. For example, in Craver v. City of Los Angeles, 42 Cal. App. 3d 76 (1974), the court interpreted section 182 of the Los Angeles City Charter, a charter provision very similar to Charter section 141 (a). Los Angeles's charter section 182 provided:

> Whenever any member of the Fire or Police Department shall become so physically or mentally disabled by reason of bodily injuries received in, or by reason of sickness caused by the discharge of the duties of such person in such department as to render necessary his retirement from active service . . . .

In Craver, the appellant, Earl Craver, had injured his back while lifting a small car during the course of his duties as a police officer. He was subsequently re-assigned to a less physically demanding job as a complaint board operator within the police department. Three times he applied to the board of pension commissioners for a disability pension, claiming that his back injury made it impossible for him to perform the regular duties of a police officer. Each time his application was denied by the retirement board. Craver's contention to the retirement board and then to the court was that the standard of review should be whether he could perform the usual duties of police officer, not the usual duties of the particular position to which he was assigned.

Citing to section 182 of the Los Angeles Charter and relying upon reasoning enunciated in an earlier decision, the appellate court flatly disagreed with Craver's argument. The court stated:

> Where there are permanent light duty assignments and a person who becomes "incapacitated for the performance of his duty . . . shall be retired," that person should not be retired if he can perform duties in a given permanent assignment within the department. He need not be able to perform any and all duties performed by firemen or, in the instant case, policemen. Public policy supports employment and utilization of the handicapped. If a person can be employed in such an assignment, he should not be retired

with payment of a disability
retirement pension.

Craver v. City of Los Angeles, 42 Cal. App. 3d 79-80 (1974) (citation omitted).

The Craver case has been widely cited with approval by other courts which have applied similar reasoning in ruling that there must be a causal link between the disability and the act of retirement. Courts have relied upon Craver in interpreting provisions in San Francisco's Charter (See, O'Toole v. Retirement Board, 139 Cal. App. 3d 600 (1983); Government Code section 21022, which is applicable to 37 Act counties (See, Harmon v. Board of Retirement, 62 Cal. App. 3d 689 (1976)) and Pasadena's City Charter (See, Winslow v. City of Pasadena, 34 Cal. 3d 66 (1983)).

Uniformly, these cases have held that the disability must be of such a character that it becomes necessary for the employee to retire. Thus, where the appointing authority is able to accommodate the employee in a position suited to the employee's rank and work-related physical limitations, a disability pension is not warranted or legally awardable.

B. SDMC sections 24.0501

Additional criteria further defining entitlement to an industrial disability retirement benefit is found in the SDMC. SDMC section 24.0501(a) sets forth additional standards for a disability retirement for members who joined SDCERS before September 3, 1982. This section provides in pertinent part:

(a) Any member of the Retirement System enrolled before September 3, 1982, permanently incapacitated from the performance of duty as the result of injury or disease arising out of or in the course of his or her employment, shall be retired for disability with retirement allowance, regardless of age or amount of service.

SDMC section 24.0501(b) sets forth additional standards for a disability retirement for members who joined SDCERS after September 3, 1982. It provides in pertinent part:

(b) Any member of the Retirement System enrolled on or after September 3, 1982, permanently incapacitated from the performance of duty as the result of injury or disease arising out of or in the course of his or her employment; and

(1) not arising from a preexisting medical condition, or

(2) not arising from a nervous or mental disorder, irrespective of claimed causative factors, shall be retired for disability with retirement allowance, regardless of age or amount of service.

A published court decision does exist interpreting the substance of this section. See, Bianchi v. City of San Diego, 214 Cal. App. 3d 563 (1989). In Bianchi, the court succinctly stated the legal requirements of this section as being "whether Bianchi was incapable of substantially performing his duties, and if so, whether the set of injuries or disabilities which caused the incapacity resulted from Bianchi's employment." Id. at 568. This section can be broken down more specifically into two elements; (1) the applicant must be permanently incapacitated from the performance of duties, and (2) the cause of the incapacity must be an injury sustained by the applicant in the course and scope of employment. Failure to satisfy either one of these elements or Charter section 141 precludes an applicant from entitlement to a disability retirement.

C. Board Rule 17

The provision of Board Rule 17 which is relevant to the issues addressed in this memorandum reads as follows:

Where an applicant is permanently incapacitated by reason of industrial caused disability from substantially performing the duties and responsibilities of his position, as those duties and responsibilities are defined in his job classification, the applicant is entitled, on application, to industrial disability retirement, unless it can be shown:

1. There exists within the City service a properly classified permanent position or positions within the applicant's current classification, the performance requirements of which are less demanding in some respects than those set forth in the general job classification; and

2. The duties and responsibilities of the position are normally and usually performed by an employee in the applicant's job classification and salary range; and

3. That the applicant is able to carry out the duties and responsibilities of such position or positions despite his or her disability; and

4. That such position or positions have been tendered to the applicant in writing by the appropriate appointing authority at least five days prior to the application being heard by the Board Adjudicator.

San Diego City Employees' Retirement System, Rules of the Retirement Board of Administration, 20 (1983).

Unlike Charter section 141 and the SDMC provisions outlined above, this Board Rule should not be considered an element for an applicant to prove to establish eligibility for a disability retirement. As mentioned above, Charter section 144 does not permit the Board to establish any requirements defining entitlement to benefits, and once vested, a pension right cannot be destroyed or unjustifiably withheld or modified (by Board Rule or otherwise) without impairing a contractual obligation of the employing public entity. Betts v. Board of Administration, 21 Cal. 3d 859, 863 (1978).

Nevertheless, this provision of Board Rule 17 does serve a useful purpose in that it is consistent with Charter section 141(a) and the cases cited on page 4 of this memorandum. In fact, it is probably fair to infer that the Board put this provision into Board Rule 17 after one of those cases was decided. Thus, this provision of Board Rule 17 should be viewed and utilized by staff, Board Adjudicators and the Board alike as a guideline for interpreting Charter section 141(a).

C. Application to Pending Disability Cases

In evaluating the merits of any industrial disability application, staff, board adjudicators and the Board should look primarily to Charter section 141 (a) and SDMC section 24.0501. The burden is upon the applicant to prove by a preponderance of the evidence that he or she is entitled to the benefit. Evidence and medical reports are relevant if they tend to prove or disprove the required elements.

The first issue to consider is whether the elements of the

SDMC have been satisfied: did the applicant sustain a permanent injury or disease which arose out of or in the course and scope of employment?; and, does the injury or disease substantially incapacitate the individual from performing the customary and usual duties associated with his or her position?

The scope of duties which should be used in this phase of the evaluation are those customary duties associated with the particular position held by the applicant at the time the disability application is submitted to SDCERS, not the full range of duties set forth in the job classification or those duties performed in a position previously held by the applicant.

It is also relevant to consider the post injury work history of the applicant to evaluate whether he or she is incapacitated. If an applicant has satisfactorily performed on the job for a period months or years after suffering the injury, this tends in logic and reason to show that they may not incapacitated. On the other hand, if an applicant's post-injury work history is short, or if he or she cannot return to work after the injury, this tends to show that the applicant is incapacitated. Courts have recognized the value of such evidence.

For instance, in O'Toole v. Retirement Board, 139 Cal. App. 3d 600, 603-604 (1983) the court stated, "Looking at the realities of this case, O'Toole was employed as a public affairs officer for some six and one-half years following the inception of his disability. He could have continued in his position had he not chosen to retire." "This assignment was obviously compatible with his disability, for he appears to have worked full time for some six and one-half years prior to his resignation." This is the same kind of observation cited by Board Adjudicator John S. Einhorn in support of his decision recommending denial of the industrial disability application of William Flohr.

It should be stressed that such evidence of post-injury work history should not be considered conclusive on the issue of whether the applicant is incapacitated, a concern expressed by the Board in referring the matter back to Board Adjudicator Einhorn for reconsideration. However, as aptly stated by Board Adjudicator Einhorn in his decision, "the adjudicator cannot "ignore" the record. Post injury work history must be factored in when deciding whether the applicant has sustained his burden of proof."

The second issue to consider in evaluating any application is whether the requirements of Charter section 141(a) have been satisfied. The applicant's reason or motivation for his or her retirement is relevant. It is appropriate to consider all

evidence on this issue because the Charter permits the award of a disability retirement only when the character of the disability is such that it forces or "renders necessary" retirement from active service. The critical question to ask in evaluating these cases is whether the applicant is forced to retire because of the disability or is applicant retiring for some other reason? The burden is upon the applicant to prove that he or she is retiring because of the disability.

If evidence exists tending to show that there exists another reason for the retirement, other than the disability, that evidence should be factored into the decision. For example, in the pending disability application of James E. Stuart, Board Adjudicator Boone considered the fact that less than a week before the applicant ceased coming to work he was involved in a heated dispute with his supervisor over working hours. Such evidence tends to indicate that he may have stopped coming to work, not because of his disability, but because he was unhappy with the change in working hours forced upon him. Again, this piece of evidence should not be considered conclusive on the issue, but should be factored into the overall evaluation of the case to determine whether the applicant has met his burden of proving that he is retiring because of the disability.

On the other hand, evidence of the availability of light duty position is not just "a factor" to be weighed, but strong evidence that is better characterized as presumptively conclusive on the issue. As interpreted by the courts, if there exists a suitable alternative position within the City which fully accommodates the medical limitations of the applicant, such evidence makes it very difficult, if not impossible, for the applicant to argue that he or she has been forced from active service because of the disability. Of course, the appointing authority may believe that a particular light duty position is a reasonable accommodation and the applicant's perspective on that issue may differ. In that situation, it may be possible for the applicant to base his case on the fact that he or she was forced to retire because he or she could not perform the usual and customary duties associated with the purported "light duty" position.

A Board Rule 17b retirement will almost always implicitly raise an issue regarding the motivation for the applicant's retirement. Board Rule 17b is a perfectly legitimate administrative rule which permits an applicant to retire with a service retirement while his or her disability application is pending. However, Board Rule 17b should not be confused with the elements of a disability retirement set forth in the Charter and the SDMC; those elements must still be satisfied. With a Board

Rule 17b retirement, evidence could exist tending to show that the applicant was motivated to retire for some reason other than his or her disability. He or she has reached service retirement age and may just want to, enjoy life without working, re-locate to another state, accept employment outside the City or to take advantage of increased benefits available through an early retirement incentive provision in the plan. To the extent that such evidence exists and tends to show that the applicant was motivated to retire for a reason other than his or her disability, it should not be ignored.

CONCLUSION

With more and more frequency, our office has been hearing the frustrations expressed by Retirement Department staff, board adjudicators, retired member associations and Board members with regard to the standard of review utilized in evaluating disability retirement applications. Our hope that all interested parties will find the framework of analysis set forth in this memorandum informative and useful.

We recommend that board adjudicators Betty Boone, John Einhorn and Robert Neal reevaluate those cases assigned to them in light of this opinion. They may or may not be inclined to modify their decisions based upon this memorandum. Having provided them with our view of the proper framework for analysis, we feel it would be inappropriate for us to comment as to whether they should or should not change their conclusions.

Lastly, we are ever cognizant, as Board members should be, of the fiduciary obligations of the Board. The ultimate responsibility and accountability for administering SDCERS disability benefits rests with the Board. Charter section 144 designates the Board to be the "sole judge" of who shall be entitled to receive such benefits and, as fiduciaries, the Board is legally obligated to award those benefits in strict accordance with the laws defining the plan document.

If you have any further questions, please give me a call.

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