

MEMORANDUM OF LAW

DATE: July 27, 1995

TO: Lawrence B. Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Service Requirements for Deferred Retirement - Mike Console

This memorandum is in response to your inquiry about the deferred retirement application of Mike Console. You have questioned Mr. Console's eligibility for this benefit as well as the Board's authority to grant it. A background and our analysis follow.

QUESTION PRESENTED

Does the Retirement Board of Administration ("Board") have the authority to award a deferred service retirement benefit to a former member of the San Diego City Employees' Retirement System ("SDCERS") hired before December 8, 1976, but who has less than ten years of creditable service when he reaches the age of sixty-five?

SHORT ANSWER

Yes. The Board has the authority to grant deferred service retirements to former members of SDCERS hired before December 8, 1976, who have less than ten years of creditable service when they reach the age of sixty-five, if they requested a deferred retirement upon termination.

BACKGROUND

Mr. Console began his service with The City of San Diego on September 1, 1957. He became a general member of SDCERS on April 4, 1958. He subsequently terminated his City service on December 31, 1966. He left his contributions on account with SDCERS upon termination.

On March 9, 1984, Mr. Console changed his beneficiary designation and filled out an application for a deferred retirement pursuant to San Diego Municipal Code ("SDMC") section 24.0206. His signature on the application acknowledges that he read the explanation on the form. The form stated that a member who separated from the City was eligible for a deferred service retirement if he or she had completed twenty years or more of service, or had \$500.00 or more in accumulated contributions at the date of termination. According to this form, if a member had twenty years of service or \$500.00 or more in accumulated contributions, the member would be eligible for a deferred retirement at the age of sixty-five, regardless of years of service. Mr. Console had more than \$500.00 in accumulated contributions upon termination.

The Retirement Office sent Mr. Console a letter dated March 22, 1984, indicating that a preliminary computation of his retirement allowance for age sixty-five based on his eight and one-half years of creditable service would be \$87.05 per month.

Mr. Console turned sixty-five years old on May 23, 1995. He is now requesting a deferred retirement. You have asked whether Mr. Console is eligible for a deferred service retirement in light of the fact that he has approximately eight and one-half years of creditable service rather than the ten years of creditable service required under San Diego City Charter ("Charter") section 141.

DISCUSSION

A. Legislative History of SDMC section 24.0206

Historically, general and safety members who discontinued City service were allowed to take a "deferred" retirement if they had twenty years of service with the City or had a minimum of \$500.00 of contributions in SDCERS at the date of termination. As originally drafted and codified, SDMC section 24.0206 read as follows:

If the service of a member, other than a safety member, is discontinued other than by death or retirement, upon proper application to the Board of Administration he shall have returned to him all of his accumulated contributions, plus compound interest, as determined by the Board, within six months from the date of termination; provided, however, that if said employee so terminating his service is credited with 20 years or more of city service, or has \$500.00 or more in accumulated contributions (including any additional contributions), he shall have the privilege of leaving all of said accumulated contributions (including any additional contributions) with the system, in which event the member will be entitled to service retirement benefits when he has met the age requirements, based on his service and salary prior to termination of his employment (emphasis added).

This section was incorporated into the Municipal Code on October 25, 1962, by Ordinance No. O-8744 N.S.

While the legislative history regarding the creation of this benefit is scant, a thorough review of previous memoranda, retirement pamphlets and forms reveals that the City Council intended to create a benefit that allowed members who terminated City service with twenty or more years of service or \$500.00 in contributions, to leave their contributions on account and to receive a deferred retirement once they

reached age sixty-five. With age sixty-five deferred retirements, the member received a prorated benefit based on his or her years of service. The use of age sixty-five was not without precedent. Prior to 1991, the Charter contained a provision for mandatory retirement at age sixty-five. In fact, service retirements for active employees at age sixty-five were routinely granted with less than ten years of service until 1991 when the mandatory retirement age was eliminated.

Deferred service retirements at age sixty-five with less than ten years of service, however, were of a more limited duration. Such retirements were discontinued on December 8, 1976, when SDMC section 24.0206 was amended to eliminate them. As amended, only those members who terminated with ten years or more of City service were allowed to leave their contributions with SDCERS in order to receive a deferred service retirement when the age requirements were met. This amendment applied to all employees hired on or after December 8, 1976.

SDMC section 24.0206 was amended again in 1983 as a housekeeping measure to clarify eligible service as "continuous service." In 1990, it was last amended to allow members with less than ten years of continuous service to leave contributions with SDCERS for the specific purpose of future participation in SDCERS if later reemployed with the City. This amendment made it clear that members terminating service, but with less than ten years of service, had the right to leave their contributions in SDCERS only for the purpose of earning additional service credit if later reemployed by the City.

B. Application of SDMC section 24.0206

You have asked whether the Board has the authority to award deferred service retirement benefits to former members of SDCERS who have less than ten years of creditable service when they reach the age of sixty-five. We believe they do.

The issue of retirement at age sixty-five with less than ten years of service is not new. We concluded in a Memorandum of Law dated August 6, 1956, attached, that this practice did not offend the Charter because the ten year vesting requirement and the mandatory retirement age could be harmonized by allowing active employees to retire at age sixty-five with a prorated benefit if they had less than ten years of service. We reaffirmed this opinion in subsequent legal opinions dated August 1, 1971; November 7, 1991; and, March 9, 1992.

Since the mandatory retirement age of sixty-five was later repealed by the electorate on February 19, 1991, we also concluded, as more fully discussed in our earlier opinions and pursuant to the authority of *Betts v. Board of Administration*, 21 Cal. 3d 859, 866 (1978), that the opportunity to retire at age sixty-five with fewer than ten years of service would be available to those members who were hired before February 19, 1991.

In *Betts*, the court articulates a theory of vested rights for public employee pensions. "A public employee's pension constitutes an

element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity." *Betts*, 21 Cal. 3d at 860. In addition, "the employee does not obtain prior to retirement, any absolute right to fixed or specific benefits, but only to a 'substantial or reasonable pension.'" *Id.*

The same analysis applies to the question you pose. The first issue we face is whether SDMC section 24.0206, in its original version, conflicted with Charter section 141. It did not. Charter section 141 clearly mandates a ten year service vesting requirement for employees. SDMC section 24.0206, as it was originally drafted, applied only to members who discontinued City service. It did not have a minimum service requirement for vesting purposes. Instead, SDMC section 24.0206 allowed members who left City service and who left their contributions in the System to draw service retirement benefits when they met the age requirement, regardless of years of service. The original version of SDMC section 24.0206 is consistent with the Charter. The Charter sets minimum vesting requirements for employees, not for members who left City service. Longstanding rules of statutory construction support our conclusion.

Generally speaking, "the city charter represents the supreme law of the city, subject only to conflicting provisions in the state and federal constitutions, or to preemptive state or federal law. The charter supersedes all municipal laws, ordinances, rules or regulations that are inconsistent with its provisions." 2 *McQuillin, The Law of Municipal Corporations* 841 (3d ed. 1988).

Specifically, article XI, section 5, subdivision (b) of the state constitution gives full power to charter cities to provide for the compensation of their employees. In this context, "it is clear that provisions for pensions relate to compensation and are municipal affairs within the meaning of the Constitution." (Citation omitted.) *Grim v. City of San Diego*, 94 Cal. App. 3d 33, 37 (1979).

With respect to our Charter, the Court of Appeals has held:

The Charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation. Citations. . . . All rules of statutory construction as applied to charter provisions citations are subordinate to this controlling principle A construction in favor of the exercise of the power and against the existence of any

limitation or restriction thereon which is not expressly stated in the charter is clearly indicated Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied. Citations.

Id. at 38.

In approaching the task of construing Charter section 141, in light of SDMC section 24.0206, we are further guided by additional principles of statutory construction. They include:

Effect should be given, if possible, to every section, paragraph, sentence, clause and word in the instrument and related laws When the words used are explicit, they are to govern Words must be interpreted in the sense in which they are ordinarily used and understood, unless some other interpretation is clearly indicated by the charter.

2 McQuillin, *The Law of Municipal Corporations* 916 (3d ed. 1988).

The Charter sets minimum vesting requirements for employees. It does not set vesting requirements for former employees and former members of SDCERS. Based on the above principles, the vesting requirements for employees set forth in the Charter should not be considered a limitation of the Council's authority to set different, or no, vesting requirements for members who terminate City service. Construing the Charter and SDMC section 24.0206 together, giving effect to each, leads to our conclusion that deferred retirements at age sixty-five with less than ten years of service are legal.

While legal under the Charter, the practice of allowing deferred retirements at age sixty-five with less than ten years of service was discontinued on December 8, 1976. Based on the theory of vested rights, former members hired before December 8, 1976, who requested a deferred retirement upon termination, are eligible to receive a deferred retirement at age sixty-five with less than ten years of service.

Therefore, members who were hired on or after December 8, 1976, are not entitled to a deferred retirement at age sixty-five with less than ten years of service. The only group entitled to this benefit based on the law in effect prior to their termination, is former members who were hired prior to December 8, 1976, and who requested a deferred retirement upon termination. This group has a vested right to this benefit. This group has been identified. It is finite. It is diminishing.

Based on the above, we find the previous practice of deferring retirement benefits for members who leave City service with less than ten years of service and more than \$500.00 in contributions, to be legal under the Charter. However, this practice was questioned and ultimately

discontinued on December 8, 1976. In light of these changes to the Charter and the SDMC, only a small group of former members are entitled to retire at age sixty-five with less than ten years of service.

CONCLUSION

SDMC section 24.0206 previously allowed a general member who discontinued City service to receive a deferred retirement at age sixty-five regardless of years of service as long as the terminated member had \$500.00 or more of contributions on account with SDCERS. This benefit was subsequently eliminated on December 8, 1976. Notwithstanding this change, former members of SDCERS who were hired prior to December 8, 1976, and who requested a deferred retirement upon termination, have a vested right to a deferred retirement at age sixty-five with less than ten years of service. Accordingly, the Board has the authority to award such retirements. As such, Mr. Console's request for a deferred retirement should be granted.

JOHN W. WITT, City Attorney

By

Jennifer K. Hooper

Deputy City Attorney

JKH:jrl:352(x043.2)

Attachments

ML-95-50