

## MEMORANDUM OF LAW

**DATE:** August 28, 1998

**TO:** Ed Ryan, Auditor and Comptroller

**FROM:** City Attorney

**SUBJECT:** Use of the Auditor's and Comptroller's Services by the San Diego City Employees' Retirement System

### QUESTION PRESENTED

Would the Auditor and Comptroller for the City of San Diego [the Auditor] be required to cease performing the payroll function for payment of benefits by the San Diego City Employees' Retirement System [SDCERS] if requested to do so by the Board of Administration [Retirement Board]?

### SHORT ANSWER

No. Under the San Diego Charter, the Auditor is responsible for issuing checks on behalf of SDCERS for payment of retirement benefits. These functions are not changed by the California Pension Protection Act of 1992 [Act] because the Auditor's benefits payroll functions serve to verify the accuracy of claims made on the Retirement Fund and are essentially ministerial acts. The Retirement Board continues to hold the ultimate authority and responsibility to determine what draws shall be made on the Retirement Fund, to whom they will be paid, and in what amounts.

## DISCUSSION

### I. Introduction

SDCERS was established by the City pursuant to its Charter and is subject to the Charter and the San Diego Municipal Code [SDMC]. Compared to other public employee retirement systems, SDCERS was created as a relatively independent retirement system.<sup>1</sup> The system is managed by the Retirement Board. The Retirement Board has exclusive control over the administration and investment of retirement funds, sole authority to determine the conditions under which persons may be admitted to benefits under the system, and the prerogative to establish rules and regulations for the system. Charter 144. The Charter mandates that all money contributed to the system be placed in the City Treasury, in a special trust fund, the Retirement Fund, separate from all other City funds. Charter 145. Likewise, under the Municipal Code, the Retirement Board prepares its own budget and pays for its administrative costs with undistributed earnings generated by the Retirement Fund. SDMC 24.0906. The Board may retain an actuary and independent investment counsel. SDMC 24.0901.

Still, as an entity that exists by virtue of the City's Charter for the benefit of the City's employees, SDCERS is very much connected to and part of the City's government. For example, as mandated by Charter section 144, the Retirement Board includes members drawn from different sectors of the City government (the City Manager, the City Auditor and Comptroller, the City Treasurer), its employees (active employees, retired employees, and safety employees), and City Council appointees (a bank officer and three citizens of the City).<sup>2</sup> The Retirement Fund is a special fund placed in the City Treasury. Charter 145. The Board's classified employees are part of the City's Civil Service system. Charter 144. Further, while the Retirement Board has the authority to determine the conditions under which persons may be admitted to retirement benefits, the Board makes that determination "under such general ordinances as may be adopted by the Council." Charter 144. The Charter also empowers the City Council to enact the necessary ordinances to carry out the terms of the Charter with respect to the retirement system. Charter 146; *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 39 (1979).

In addition to sitting on the Retirement Board, the Auditor is responsible under the Charter for performing payroll and auditing functions for SDCERS. Charter 39, 82, 83, 144, 148; SDMC 24.0907. Since the inception of SDCERS, the Auditor has handled these functions for SDCERS. The Retirement Administrator has recently expressed a desire to operate the retirement benefits payroll independent of the Auditor and will be bringing this issue before the Retirement Board for its consideration.

The California Pension Protection Act of 1992 (also known as Proposition 162), a statewide ballot initiative, was approved by California voters on November 3, 1992.<sup>3</sup> The Act amended article XVI, section 17 of the California Constitution. Since its passage, this Office has written one legal opinion and two memoranda regarding the effect of the Act on the administering boards for the City's benefit plans. 1992 Op. City Att'y 9; 1993 City Att'y MOL 692; City Att'y MOL No. 98-7 (Feb. 2, 1998). In addressing the issues presented in this memorandum, we reiterate the words of caution written in the first opinion issued by the City Attorney regarding the Act:

As long as the Retirement System operates efficiently, the legal nuances of Charter power allocation between the Board and the Council may seem inconsequential. Nothing could be further from the truth. The Retirement Fund is presently valued at close to 1.2 billion dollars and millions of dollars are paid into and out of the Fund each year.<sup>4</sup> As illustrated by the cases cited throughout this memorandum, a seemingly innocuous action by the Board or the Council can be transformed into a problem of enormous magnitude with disastrous results.

1992 Op. City Att’y at 23 (footnote added).

This Office has previously opined that the Act applies to SDCERS. *See* 1992 Op. City Att’y 9; 1993 City Att’y MOL 692; *see also* City Att’y MOL No. 98-7. As discussed in the prior opinions, the Act does not simply supplant local laws existing at the time of its passage; depending on the degree of conflict between the existing local law and the Act, the Act may supersede local law, may be harmonized with local law, or may not address and therefore not affect a matter addressed by local law. In this instance, as the Act generally addresses administration of retirement systems while local law specifically addresses the role of the Auditor within that system, we must carefully consider whether the Act alters the relationship between the Auditor and the Retirement Board in regard to the Auditor’s benefits payroll functions, and if so, to what extent.

## **II. Prior City Attorney Opinions Establish A Standard For Evaluating the Effect of the Act on Charter and Municipal Code Sections Relating to SDCERS**

San Diego is a charter city; it was established under a charter, and that charter is the supreme law of the City. As such, the City’s power to make and enforce ordinances and regulations regarding municipal affairs is “subject only to the restrictions and limitations imposed by the city charter, as well as conflicting provisions in the United States and California Constitutions and preemptive state law.” *Grimm*, 94 Cal. App. 3d at 37.

Under article XI, section 5, subdivision (b) of the California Constitution, charter cities have “plenary authority” over compensation paid to their employees. Retirement systems are considered matters of local concern within the purview of local law, because they are part of the compensation of a charter city’s employees. *Grimm*, 94 Cal. App. 3d at 37; *Sonoma County Org. of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 315-17 (1979). Generally, passage of a state law addressing a matter of local concern will not affect charter cities. *Sonoma*, 23 Cal. 3d at 315-17. The Act, however, not only amended the California Constitution, it included language providing for its application “notwithstanding any other provision of law or this Constitution to the contrary.”

As stated in the first legal opinion written by this Office discussing the Act, the Act “elevates the specific subject matter contained within it from a matter previously considered purely a ‘municipal affair’ under the ‘home rule doctrine,’” as discussed in *Grimm*, 94 Cal. App. 3d at 37, “to a subject matter of statewide concern,” requiring the Retirement Board and Council to harmonize local laws with the Act. 1992 Op. City Att’y at 10-11. However, if a matter that

relates to the retirement system is not addressed by the Act, it remains a municipal affair, subject to local laws, rules and regulations. *Id.* at 11.

**A. City Attorney Opinion No. 92-2 (December 17, 1992)**

Opinion 92-2 addressed two issues: first, whether the Board must obtain Council authorization to hire a bank or consultant; and second, whether the Board must follow Council Policies and Administrative Regulations to hire a bank to serve as custodian of the Retirement Fund or to retain consulting services. In response, we opined that the Board may contract with the bank of its choice to serve as custodian of the Retirement Fund, without approval of Council, because that function falls squarely within the duties of the Board as set forth in the Charter and the Act. 1992 Op. City Att’y 9, 21. Our opinion as to the hiring of a consultant was more qualified, because the hiring of consultants is addressed by a Council Policy and an Administrative Regulation. Harmonizing these provisions with the Act, we concluded that “the answer depends upon the nature of the services provided by the consultant.”

If the services relate to a project or subject matter within the purview of power granted by the Charter to Council, then yes, Council Policy must be followed. On the other hand, if the services relate to a project or subject matter within the scope of power granted by the Charter or the Act to the Board, the Board is not required to follow Council policies in selecting a consultant.

*Id.* Thus, if the Retirement Board sought to retain a consultant to analyze the conditions under which persons should receive retirement benefits, then the Board must follow the City’s policy and regulation because that matter remains a matter of local concern. *Id.* at 21-22.

**B. 1993 City Attorney Memorandum of Law 692 (December 15, 1993)**

A year later, in a Memorandum of Law dated December 15, 1993, this Office addressed the issues of the Retirement Board’s authority to set salaries for SDCERS’ unclassified staff, and to increase the salaries of the Assistant Administrator and Administrator. In that Memorandum, this Office concluded that existing local law set forth in the City’s annual salary ordinance and the Charter governed as long as those provisions did not unreasonably impair the Board’s ability to meet its fiduciary obligations.

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.*

1993 City Att'y MOL 692, 694 (emphasis added). Accordingly, the salary increase approved by the Board for the Administrator was acceptable because it fell within the range provided by the salary ordinance. The Board did not, however, have the authority to implement the salary increase retroactively. *Id.* at 694-95. The salary increase requested by the Administrator, as department head, for the Assistant Administrator, was also within the range provided by the salary ordinance and was acceptable without further action by Council. *Id.* at 695-96.

### **C. City Attorney Memorandum of Law Number 98-7 (February 2, 1998)**

This Office recently published City Attorney Memorandum of Law Number 98-7, dated February 2, 1998, opining that the Act applies to the City's Defined Contribution Plans Trustee Board [Trustee Board]. City Att'y MOL No. 98-7 at 27. In that Memorandum, we further described the relationship between the Act and existing local law.

[A]ny existing statute, charter provision, or public agency procedure that usurps or transfers ultimate authority over administration of a public retirement or pension system away from the board that governs that system would be unconstitutional pursuant to this section. *Statutes that do not usurp or transfer a board's ultimate authority to decide administrative issues remain permissible, provided that their application does not unduly interfere with the constitutional fiduciary duties imposed exclusively upon retirement boards.* Moreover, any decision by a board to use its plenary authority to depart from a permitted statutory administrative scheme must be exercised in conformance with the overriding fiduciary duties imposed on the board by the Constitution.

City Att'y MOL No. 98-7 at 20-21 (emphasis added). Applying the Act to the Trustee Board, this Office found that the Act heightened the Trustee Board's fiduciary responsibilities above those provided in the Master Trust Agreement, rendering unconstitutional a provision in the Agreement that would have allowed the Trustee Board to delegate fiduciary responsibility to the City. *Id.* at 29.

This Memorandum also addressed the role of the Auditor in relation to the payment of the Trustee Board's administrative expenses and determined that the Auditor's function is not changed by the Act. *Id.* at 30-31. Further, the Act does not give the Trustee Board the authority to amend plan documents or to determine the level of benefits to be provided by the defined contribution plans. *Id.* at 32-33. Under the Act, the Trustee Board need not obtain the City's approval to hire a consultant as long as the contracted services pertain to an area of the Trustee Board's exclusive authority. *Id.* at 33-34. Specifically, the Trustee Board can contract for investment consultant services without the approval of the City because the Trustee Board has exclusive authority to manage and invest the Trust Fund assets. *Id.* The Trustee Board is not required to follow City policies and regulations for

selection and approval of such a consultant. *Id.* at 35.

#### **D. A Test for Application of the Act to Local Law**

In each of the City Attorney's opinions, essentially the same test is used to determine whether the local law, policy or regulation in question is superseded by or can be harmonized with the Act. That test is: (1) is the subject matter of the local law or rule covered by the Act, i.e., does the subject matter directly relate to administration of a retirement system or to investment or administration of a retirement fund? If not, then the local law or rule must be followed. If so, then (2) does the local law or rule usurp or transfer the Retirement Board's ultimate decision-making authority, or unreasonably impair or interfere with the Retirement Board's ability to meet its fiduciary obligations? In answering the second question, we look to the rules of interpretation and determine whether the local rule can or should be harmonized with the Act to avoid its demise. Finally, (3) is departure from the local law or rule consistent with the Retirement Board's fiduciary duties? With this test in mind, we turn to the specific question you have asked.

### **III. Application of the Act to Charter and Municipal Code Sections Relating to the Auditor's Benefits Payroll Functions**

#### **A. The Auditor's Role as Mandated by the Charter and Municipal Code**

The office of the Auditor and Comptroller for the City of San Diego is created in section 39 of the Charter. Pursuant to that section, the Auditor is elected by Council and serves as the chief fiscal officer for the City. The Auditor supervises all accounts and reports to the City Manager and Council on the financial condition "of each Department, Division and office" of the City.<sup>5</sup> Charter 39. Sections 80 through 84 of the Charter establish procedures for the payment of the City's expenses while safeguarding the financial security of the City Treasury. Section 82 of the Charter prescribes the Auditor's duties in detail.

The Auditor and Comptroller shall examine all payrolls, bills, and other claims and demands, except claims for damages against the City, and shall issue no warrant or check-warrant for payment unless he finds that the claim is in proper form, correctly computed, and duly approved; that it is legally due and payable; that an appropriation has been made therefor which has not been exhausted; and that there is money in the treasury to make payment. He may investigate a claim . . . and if he finds a claim to be fraudulent, erroneous or otherwise invalid, he shall not issue a warrant or check-warrant therefor.

Section 83 of the Charter ensures that all requests for payment are made through the Auditor, and not paid unless approved by the Auditor. Charter section 126 mandates the handling of payrolls for the classified or unclassified service by the Auditor. Although Municipal Code section 24.0901 allows the Retirement Board to retain an actuary and independent investment counsel, neither the Code nor the Charter makes the same provision for an auditor.

These sections delineating the duties of the Auditor are consistent with the language of

Charter section 144 governing the Retirement Board, and reflect the intent that SDCERS use the City's Auditor for its payroll functions. Indeed, since the inception of SDCERS, the Auditor has, in fact, handled the retirement benefits payroll for SDCERS in accordance with the Charter.

## **B. The Act's Effect on the Auditor's Role**

Our previous opinions discuss the legislative history and language of the Act at length. *See* 1992 Op. City Att'y at 16-20; City Att'y MOL No. 98-7 at 18-31. Those discussions will not be repeated here. Nevertheless, it is important for the purpose of this analysis to revisit some of the pertinent language and legislative history of the Act.

The Act (Proposition 162) was written largely in response to actions taken by the California State Legislature against the retirement system for state employees, the California Public Employees Retirement System [CalPERS]. The analysis by the Legislative Analyst included in the ballot specifically referred to the Legislature's action transferring the actuarial function from the CalPERS Board to an actuary appointed by the Governor and confirmed by the Legislature, and the use of CalPERS assets to offset employer contributions.<sup>6</sup> Thus, the ballot arguments for Proposition 162 refer to "raids on pension funds."

The Act sought to eliminate such "political interference" by separating retirement boards from legislative control, especially control over the use of retirement funds. To do so, the Act amended article XVI, section 17 of the California Constitution to give more independence and greater fiduciary responsibilities to public retirement boards. The Act does that in three primary ways. First, the Act gives retirement boards "plenary authority and fiduciary responsibility" for investment of retirement funds *and* administration of the retirement system. Second, the Act clarifies the fiduciary responsibilities accompanying the increased independence. The Act provides that boards have the "sole and exclusive fiduciary responsibility over the assets" and the "sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits" to participants and beneficiaries. Third, while maintaining the duties of retirement boards to minimize employer contributions and pay only reasonable costs of administration, the Act mandates that the primary duty of a retirement board is to its participants and beneficiaries.

The issue of the Auditor's involvement with SDCERS implicates that part of the Act giving retirement boards "plenary authority" for administration of the retirement system as well as investment of retirement funds. "Plenary authority" means "full, complete and absolute final-decision-making authority within the boundaries of the grant of fiduciary authority." SACRS Prop. 162 Op. at 13-14; *see Black's Law Dictionary* 1154 (6th ed. 1990) (defining "plenary powers" as "Authority and power as broad as is required in a given case."). "Administration" means management of the retirement system for the purposes set forth in the Act. SACRS Prop. 162 Op. at 14; *see American Heritage Dictionary of the English Language* 23 (3d ed. 1972) (defining administration as "Management of an institution, public or private.") and *Black's Law Dictionary* 44 (6th ed. 1990) ("In public law, the administration of government means the

practical management and direction of the executive department . . .”).

These provisions of the Act already existed in section 144 of the Charter before the Act was placed on the ballot. *See* 1992 Op. City Att’y at 12. Charter section 144 provides that SDCERS “shall be managed by” the Retirement Board. That section further states that the Retirement Board “shall have exclusive control of the administration and investment of” the Retirement Fund. Thus, in the case of SDCERS, where the mandated structure is in harmony with the language and intent of the Act, the Act “should have little or no practical impact on the way the Retirement System currently operates.” 1992 Op. City Att’y at 12.

### **C. Must the Auditor Perform the Payroll Function for Payment of Benefits?**

As discussed above, this Office has opined that the Auditor’s role in writing checks for administrative expenses, as set forth in Charter sections 39 and 80 through 84, does not violate the Act because it is simply a verification procedure. City Att’y MOL No. 98-7 at 30-31. Likewise, the Auditor’s role in issuing checks for the payment of benefits is to verify that the payment was properly authorized by the Board, is due and payable, and that money, appropriated for that purpose, exists in the City Treasury (in this case, the Retirement Fund in the Treasury) to pay the claim. *Id.* at 31; Charter 82.

The Auditor does not determine what expenses should be paid, in what amounts, or for what purpose. Rather, the Auditor serves as a gatekeeper to the City Treasury of which the Retirement Fund is a part. By monitoring deposits to and disbursements from the Treasury, the Auditor knows and is able to report the condition of the Treasury. Thus, the Auditor’s role in issuing checks is not a decision-making or management function but a ministerial act designed to ensure the solvency of the City and its departments, as well as the accuracy of the claims payments. As such, this function of the Auditor does not usurp, interfere with, or transfer the Retirement Board’s ultimate management authority.

Further, we have no facts before us that indicate that the performance of this function by the City’s Auditor rather than an outside auditor or someone under the direct supervision of the SDCERS’ Administrator hinders the Retirement Board in the performance of its management or fiduciary duties. Retirement checks are issued based on information provided to the Auditor from SDCERS, and have always been issued in a timely manner. Use of the City Auditor for this function creates a second line of defense against error, results in lower administrative costs, and helps ensure that a public system remains open and public.<sup>7</sup> For example, the Auditor’s office has in the past, in the process of verifying that a check for the payment of benefits is in the correct amount, discovered that the salary figure used to calculate the retirement benefits was incorrect, and would have resulted in an overpayment. Once the error was brought to the attention of the SDCERS’ staff, it was corrected.

While this verification process involves the Auditor, it does not change the fact that under the Act, the Retirement Board has the ultimate authority and bears the ultimate responsibility for delivering benefits. Therefore, to the extent that Charter sections 80 through 84 impose liability on the Auditor for mis-paid checks, in those instances where the Auditor has relied on information or directions provided by SDCERS resulting in the mis-payment, those provisions



are an unconstitutional infringement on the fiduciary obligations of the Retirement Board under the Act. The Retirement Board decides, within the confines of the law, whether to pay benefits, and the Retirement Board is responsible for those decisions. Under the Act, a Charter provision transferring liability from the Retirement Board to the Auditor is unconstitutional. *See City Att’y MOL No. 98-7 at 29* (Trustee Board may not delegate a fiduciary responsibility to City).

One argument against using the Auditor to perform the benefits payroll function is that the Auditor’s duties to other City departments could potentially interfere with or delay the transmission of the retirement allowances to retired employees, in which case the Retirement Board would need to take action to fulfill its fiduciary obligations. However, *if* such a situation arose where the Auditor’s Office was not performing its duties as mandated by the Charter, and *if* that delay or negligence unduly interfered with the Retirement Board’s ability to meet its fiduciary obligations, the Auditor’s Office could be compelled to undertake its duties so that the Retirement Board’s fiduciary obligations are met. This situation is no different than if an outside auditor refused to perform duties; in either case, the Retirement Board could compel performance.

In the meantime, the Act cannot be interpreted and local laws cannot be negated based on hypothetical possibilities. Repeals by implication are not favored and will not be recognized unless two apparently conflicting laws cannot be harmonized. *Singh v. Retirement Board*, 41 Cal. App. 4th 1180, 1190 (1996). Laws “should be interpreted in such a way as to make them consistent with each other, rather than obviate one another.” *Id. quoting Nickelsberg v. Workers’ Comp. Appeals Bd.*, 54 Cal. 3d 288, 298 (1991).<sup>8</sup> Interpretations which “might lead to mischief or absurdity” should be avoided. *Board of Retirement v. Santa Barbara Co. Grand Jury*, 58 Cal. App. 4th 1185, 1189 (1997).<sup>9</sup>

Under the Act, the Retirement Board has the sole and exclusive responsibility to administer SDCERS in a manner that will ensure the prompt delivery of benefits and services to members and their beneficiaries. Absent any showing that application of Charter sections 80 through 84 unreasonably impairs the prompt delivery of benefits, the mandates in these Charter sections are not negated by the Act, they apply to SDCERS, and they must be followed. 1993 City Att’y MOL at 694.

## CONCLUSION

The California Pension Protection Act of 1992 must be understood in the context of each existing retirement system and its concomitant legal structure. In the case of SDCERS, the Act has little effect because the Retirement Board had already been granted the power under the Charter to manage SDCERS and exclusive authority to administer and invest the Retirement Fund. The Auditor’s role in issuing checks for benefits payments does not diminish the Retirement Board’s authority or interfere with its performance. Rather, the Charter provisions mandating the Auditor’s payroll function can be interpreted as a verification process intended to eliminate errors of fact and assist in the preservation of the Retirement Fund, and are thereby harmonized with the Act. Performance of this function by the Auditor does not transfer decision-making authority from the Retirement Board to the Auditor, and does not violate the Act. Consequently, under the mandates of the Charter, and absent serious performance problems

by the Auditor, the Auditor cannot be required by the Retirement Board to turn the benefits payroll functions over to SDCERS.

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