

THE CITY OF SAN DIEGO
REPORT TO THE CITY COUNCIL

DATE ISSUED: October 5, 2009

REPORT NO.: 09-142

ATTENTION: Council President and City Council
ORIGINATING DEPARTMENT: City Attorney
SUBJECT: San Diego Municipal Code Amendments
COUNCIL DISTRICT(S): All
CONTACT/PHONE NUMBER: Jan Goldsmith/236-6220

REQUESTED ACTION:

Discussion of SDCERS' request to enact an ordinance amending Chapter 2, Article 4, Division 11, of the San Diego Municipal Code by amending Section 24.1102 and repealing Section 24.1120, both relating to the City Employees' Retirement System and direction to the City Attorney.

STAFF RECOMMENDATION:

Solicit input from SDCERS and discuss issues related to SDCERS allowing General Members who participated in the 1981 Pension Plan to "buy back" formerly refunded SDCERS creditable service, which stands in contravention of the express language of San Diego Municipal Code Section 24.1102(e). Additionally, to solicit input from SDCERS and discuss issues related to SDCERS allowing former 1981 Plan participants to receive retiree health benefits in contravention of the express language of San Diego Municipal Code Section 24.1102(e).

SUMMARY:

By way of a memorandum dated January 30, 2009 addressed to the Mayor and Council Members (accompanying report), the SDCERS Board of Administration [SDCERS] requested that the City enact an ordinance amending Chapter 2, Article 4, Division 11, of the San Diego Municipal Code by amending Section 24.1102 and repealing Section 24.1120, both relating to the City Employees' Retirement System. Specifically, SDCERS has requested that the City enact this ordinance retroactively to 1992 to correct its self-styled "operational failure" of allowing since 1992, General Members to purchase SDCERS service credit with their refunded SDCERS contributions withdrawn when they enrolled in the 1981 Pension Plan. This purchase allowance by SDCERS for the last 17 years was and is in contravention of the preclusion of such in section 24.1102(e) of the San Diego Municipal Code. Despite the Municipal Code's preclusion of this purchase allowance by General Members, SDCERS apparently allowed it pursuant to the City's 1992 MOUs with the General Member labor organizations (MEA and 127). In its January 30, 2009 memorandum, SDCERS admits that it cannot offer a rationale why the Municipal Code was not amended in 1992 or since, to codify the MOU provisions it purportedly

relied upon. SDCERS has also indicated that unless the Municipal Code is amended as requested to sanction the purchase allowances it has facilitated since 1992, it will unwind all of them.

Although not similarly mentioned in the January 30, 2009 SDCERS memorandum, the proposed amending ordinance attached thereto indicates that SDCERS also requests that the City amend Section 24.1102(e) in order to correct another of its "operational failures" by allowing former 1981 Plan participants to receive retiree health benefits despite that section's prohibition of such. Despite this specific preclusion of affording retiree health benefits to former 1981 Plan participants, SDCERS has allowed same, ostensibly also pursuant to the City's 1992 MOUs with the General Member labor organizations.

Review of the materials provided by SDCERS as well as other discovered relevant materials reveal that in 1992 as a result of "meet and confer" with the General Member labor organizations, the City agreed to allow General Members of the then 1981 Pension Plan to "buy back" past City service time via the redeposit of contributions refunded to them when they elected to leave the SDCERS General Retirement Plan and join the 1981 Pension Plan¹. Further, this "Meet and Confer" resulted in the City's agreement to extend the retiree health benefit to 1981 Plan participants. These agreements were codified in the applicable MOUs the City entered into with its General Member labor organizations, which were subsequently ratified. While the agreed to purchase allowance and retiree health benefit were set forth in the preamble to the 1992 ordinance enacting various retirement plan amendments, inexplicably they were not contained within that ordinance. Additionally and to date, no subsequent retirement system ordinance ever amended the Municipal Code to reflect the agreed to purchase allowance or to specifically repeal the retiree health benefit prohibition. Consequently, the San Diego Municipal Code still reads as prohibiting the "buy back" purchase allowance by former 1981 Plan Members and the extension of retiree health benefits to them.² SDCERS has offered no explanation for this, nor independently can one be unearthed. Apparently, SDCERS and the City Attorney's Office were simply remiss in not ensuring that the Municipal Code was amended consistent with the provisions of the 1992 MOUs. Despite the lack of any Municipal Code amendment to effectuate the agreed to changes in General Members benefits, SDCERS has indicated that nonetheless it has extended the purchase allowance option to General Members who were previously participants in the 1981 Plan and allowed 1981 Plan participants to receive retiree health benefits.

The City is now placed in a dilemma as to how to best legally rectify these seeming 17 year old errors, as well as to stave off the potential of claims if SDCERS was to in fact unwind the "buybacks" exercised pursuant to the purchase allowance and/or end the retiree health benefit. We see three issues raised by SDCERS' request. First, by enacting an ordinance now to allow the purchase allowance, is the public vote triggered under Section 143.1(a)? That section requires a public vote if an ordinance is adopted amending the retirement system that increases the benefits of any employee (Proposition B). An argument can be

¹ Subsequently abolished and members thereof returned to the SDCERS Plan.

² The Municipal Code had previously been amended to allow Safety Members to make this purchase.

made that since the ordinance adoption would occur in the near future well after the adoption of Proposition B and that it clearly would increase the benefits of General Members, necessarily the public vote dictate is triggered. On the other hand, one could argue that the doctrine of municipal ratification would apply and would merely render ordinance adoption a ministerial act retroactive to 1992, well before the passage of Proposition B, and thus not constituting a retirement benefit increase. This argument may be bolstered by individuals' claims of estoppel-that the City should be estopped from asserting legal requirements (Proposition B) that did not exist at the time they were afforded and exercised the benefit.

Second, did the membership vote taken in 1992 satisfy the membership voting dictate of City Charter Section 143.1? Although never codified in an ordinance, the extension of the purchase allowance to repurchasing General Members and retiree health benefits to former 1981 Plan participants was put to a system membership vote in 1992. However, the voting results seem to indicate that only the General Members voted, as opposed to the entire membership. This raises the issue of whether this was a legally sufficient membership vote. In prior memoranda by both this office as well as SDCERS, it has been opined that the entire membership must vote on all matters, not only the individual affected subclasses of system membership.

Third, would the requested amendments trigger California Government Code section 7507 and its requirement of an actuarial calculation and the convening of a public hearing thereon? It would appear that any Municipal Code adoption, whether facilitated retroactively via ratification to 1992 or present adoption assuming no ratification, the actuarial calculation and publication dictates of section 7507 would be triggered.

Certainly, these issues are unique, not only due to the special provisions of the City's Charter, but also due to the neglect in allowing the purchase allowance and extension of retiree health benefits for 17 years despite their otherwise preclusion in the Municipal Code. Not surprisingly, there is no law exactly on point. As a result and to ensure the provision and consideration of all information necessary to a proper analysis and course of conduct, my office solicited the input of SDCERS on these issues by way of a June 17, 2009 letter (accompanying report).

I see the equities in this situation and am desirous of a course of conduct necessary to rectification of the obvious mistake and/or neglect in not timely ensuring that the Municipal Code was amended. Any such action and discussion, however, must be open, transparent and in accordance with the law, including our City Charter. I again invite SDCERS to join us in a resolution of this matter by appearing at the Council meeting to provide input and engage in meaningful discussion publically to resolve the issues at hand. While we stand ready to review and prepare our own legal analysis on these issues, I believe the requested input and discussion from all interested parties including SDCERS is necessary prior thereto.

FISCAL CONSIDERATIONS: The cost, if any, of the "buy back" of service credit in SDCERS by General Members who were formerly members of the 1981 Pension Plan for

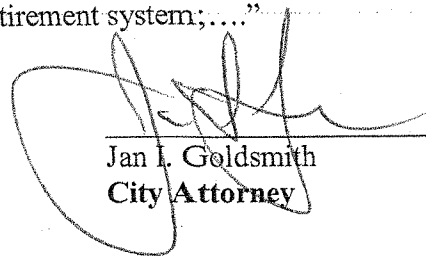
that time they were members of the 1981 Plan and the extension of the health eligible retiree health benefit to all former 1981 Plan participants.

PREVIOUS COUNCIL and/or COMMITTEE ACTION: None

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: None

KEY STAKEHOLDERS & PROJECTED IMPACTS (if applicable): SDCERS as the Plan Administrator and pursuant to Charter Section 144, the sole authority and judge under ordinances adopted by the Council "as to the conditions under which persons may be admitted to benefits of any sort under the retirement system;...."

Originating Department



Jan I. Goldsmith
City Attorney