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OPINION NUMBER O-2012-2

DATE: August 8, 2012

SUBJECT: Implementation of Proposition B Related to Members of the San Diego Police Officers Association

PREPARED FOR: Honorable Mayor and City Council

PREPARED BY: City Attorney

INTRODUCTION

This Legal Opinion supplements this Office's Reports to the Honorable Mayor and City Council (Council) regarding Implementation of Proposition B, dated June 7, 2012 (City Att'y Report 2012-14) and June 29, 2012 (City Att'y Report 2012-17). Proposition B, a citizens' initiative to amend the San Diego Charter (Charter) called "Comprehensive Pension Reform for San Diego," was approved by City of San Diego (City) voters on June 5, 2012. *See* San Diego Resolution R-307570 (July 10, 2012). Proposition B added provisions to Article VII (Finance) and Article IX (Retirement) of the Charter.

This Legal Opinion addresses two provisions added by Proposition B, at Charter sections 140 and 141.1, related to retirement benefits of employees represented by the San Diego Police Officers Association (SDPOA). SDPOA represents police officers, detectives, agents, sergeants, lieutenants, and captains, in the San Diego Police Department, and police recruits. *See* Art. 2, Memorandum of Understanding (MOU) between the City and SDPOA (SDPOA MOU), approved by San Diego Resolution R-307515 (June 26, 2012).

Charter section 140 mandates that all officers and employees, except sworn police officers, who are initially hired or assume office on or after the section's effective date participate only in a defined contribution plan for retirement. Charter section 141.1 imposes a cap on retirement benefits for sworn police officers hired after the effective date of the section, who participate in the City's defined benefit plan, and modifies their defined benefit retirement formula.

Proposition B expressly states that it must be implemented in a manner consistent with the requirements of applicable labor relations laws, and the implementation of various provisions may be delayed pursuant to a Memorandum of Understanding (MOU) between the City and any of its recognized employee organizations in effect on the effective date of the Charter

amendment. *See, e.g.*, Charter section 140, added by Proposition B (stating, in part: “This section [“Establishment of Separate Retirement Pension Systems; Definitions] shall be implemented in a manner consistent with the requirements of applicable labor relations laws.”); Charter section 150, added by Proposition B (stating, in part: “The implementation of this section [“Creation of a Defined Contribution Plan”] shall be subject to the requirements of applicable law, including, but not limited to, applicable labor relations laws and the requirements of the Internal Revenue Code, as amended.”). *See also* Proposition B, section 6, regarding “Effective Date.”

On June 26, 2012, San Diego City Employees’ Retirement System (SDCERS) General Counsel, Elaine Reagan, wrote to Mayor Jerry Sanders and Council President Tony Young, informing them of SDCERS’ determination that, as soon as Proposition B becomes effective, police recruits will be prohibited from joining SDCERS until they have completed the police academy and become sworn police officers.¹ A copy of the June 26, 2012, letter from SDCERS is attached. SDCERS has requested this Office’s opinion on this issue, as well as our opinion regarding the effective date of section 141.1, which caps the City’s defined benefit retirement for new sworn officers and modifies their retirement formula.²

QUESTIONS PRESENTED

1. What is the effective date of the requirement, under Charter section 140, that police recruits participate only in a defined contribution plan?
2. What is the effective date of the new defined benefit pension formula and cap on retirement benefits for sworn police officers, set forth in Charter section 141.1?

SHORT ANSWERS

1. Police recruits hired on or after July 1, 2013 will not be eligible for the City’s defined benefit plan until they complete the police academy and become sworn police officers. The City must negotiate the terms of a defined contribution plan with the SDPOA so the plan is in place by July 1, 2013.

¹ The Board of Administration of SDCERS is “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.” San Diego Charter § 144. However, the Council, by ordinance, establishes the retirement system and the benefits to be provided by the system, within the framework set by the Charter. San Diego Charter § 141. *See City of San Diego v. Haas*, 143 Cal. Rptr. 438 (2012) (“SDCERS is empowered to issue rules and regulations to administer the pension system and is a separate legal entity from the City. (City Charter, art. IX, §144.) The City Council, however, possesses the exclusive authority in granting and modifying retirement benefits. (City Charter, art. IX, §§141, 146.)”).

² Note, that section 140, which was added by Proposition B, gives authority to the Council to place sworn police officers hired after the effective date of Proposition B in either the defined benefit plan or in a defined contribution plan. Section 140 states, in part, “Notwithstanding the foregoing, and except as provided in this Article IX, the City Council is hereby authorized and empowered by ordinance to enroll sworn police officers hired after the effective date of this section in either the Defined Benefit Plan or the Defined Contribution Plan.” A discussion of that provision of Proposition B is beyond the scope of this Opinion.

2. The defined benefit formula modifications, set forth in section 141.1, take effect on July 1, 2013. Before that date, the City must negotiate with the SDPOA any impacts that the SDPOA identifies related to the modifications.

DISCUSSION

Proposition B amends the Charter, which is the City's "constitution." *San Francisco Fire Fighters v. City & County of San Francisco*, 68 Cal. App. 3d 896, 898-899 (1977) ("[A] charter is to a city what the state Constitution is to the state."). See also *San Diego City Firefighters, Local 145, AFL-CIO v. Board of Administration of the San Diego City Employees' Retirement System*, 206 Cal. App. 4th 594, 608 (2012)(citing *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994)).

The Charter authorizes the Council to establish retirement benefits for City employees. San Diego Charter, art. IX. In establishing these benefits, the Council must comply with "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 v. City of San Diego*, 94 Cal. App. 3d 33, 37 (1979). See also *City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 598-599 (1949) ("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.").

In establishing retirement benefits, the Council must also comply with the Meyers-Milias-Brown Act (MMBA), the state law relating to collective bargaining procedures, which is applicable to local public agency employers, including charter cities. *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 36 Cal. 3d 591, 597 (1984).

As we explained in our Report dated June 7, 2012 (City Att'y Report 2012-14), Proposition B relates to retirement benefits, including benefits for the City's represented employees. Retirement benefits are part of compensation,³ and, for represented employees, are mandatory subjects of bargaining under the MMBA. *County of Sacramento*, PERB Dec. No. 2045-M (2009); *Madera Unified School District*, PERB Dec. No. 1907 (2007) (stating "the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining"); *Temple City Unified School District*, PERB Dec. No. 782 (1989); *Jefferson School District*, PERB Dec. No. 133 (1980).

³ "Pension provisions are, unless excluded by agreement, part of the contemplated compensation of the city employee and therefore a consideration of the employment contract." *Dunham v. City of Berkeley*, 7 Cal. App. 3d 508, 513 (1970).

The MMBA requires the City to provide its recognized employee organizations with notice and opportunity to meet and confer over any negotiable impacts of Proposition B on represented employees prior to Proposition B's implementation. *See* Cal. Gov't Code §§ 3504.5, 3505. The City does not have a "meet and confer" obligation with respect to its unrepresented employees, and the City may proceed with implementation as to those employees, without concern for the MMBA.

Proposition B requires the City to implement a defined contribution plan for new officers and employees. Charter section 140, which was added by Proposition B, states, in part: "all Officers and employees, with the exception of sworn police officers, who are initially hired or assume office on or after the effective date of this Section shall participate only in such Defined Contribution Plans as authorized by Sections 150 and 151 of this Charter."

This Office concurs with SDCERS that police recruits are not "sworn police officers" under Charter section 140. The phrase "sworn police officers" in Charter section 140 is not defined by Proposition B. Therefore, we must look to rules of statutory construction to determine its meaning. The same principles of construction applicable to statutes apply to the interpretation of municipal charters. *United Ass'n of Journeymen v. City & County of San Francisco*, 32 Cal. App. 4th 751, 760 (1995). *See also* *Mason v. Retirement Board of City & County of San Francisco*, 111 Cal. App. 4th 1221, 1227 (2003); *Alesi v. Board of Retirement*, 84 Cal. App. 4th 597, 601 (2000). The primary goal of charter interpretation is to interpret voter intent. *Mason*, 111 Cal. App. 4th at 1227. That intent should be determined, if possible, from the language of the charter provision at issue. If, however, the "language does not provide a clear answer, we may turn to other rules of interpretation." *Id.* at 1227. An important rule is that charter provisions should not be interpreted in isolation. *Id.* at 1229. "Rather, we must construe every [provision] with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." *Id.* (quoting *Ford & Vlahos v. ITT Commercial Finance Corp.*, 8 Cal. 4th 1220, 1234 (1994) (internal quotation marks omitted)).

The ballot language for Proposition B included the City Attorney's Impartial Analysis, which stated in part:

The proposition prohibits most new employees hired on or after the effective date of the proposition from participating in the existing defined benefit pension plan. Instead, new employees, except new sworn police officers, would be offered a defined contribution plan modeled after a 401(k). (¶) The proposition authorizes the City Council to enroll new sworn police officers in either the defined benefit pension plan or defined contribution plan.

See Impartial Analysis, Ballot Pamphlet Municipal Special Election (June 5, 2012) (<http://www.sandiego.gov/city-clerk/elections/city/pdf/retirementcharteramendment.pdf>).

The Argument in Favor of Proposition B stated, in part, “YES on Proposition B will require all new City employees, except police officers, to be enrolled in a 401K-style retirement plan that caps taxpayer costs.” See Argument in Favor of Proposition B, Ballot Pamphlet Municipal Special Election (June 5, 2012) (<http://www.sandiego.gov/city-clerk/elections/city/pdf/retirementcharteramendment.pdf>).

Police recruits are not yet “police officers” or “sworn police officers.” The City’s Class Specification for police recruits defines them as “in a training capacity in preparation for [a] professional law enforcement career, to attend the Police Academy; and to perform related work.” See Class Specification, San Diego City Civil Service Commission, Police Recruit (July 1, 1999) (<http://www.sandiego.gov/empopp/pdf/classspecs/Police-Recruit.pdf>).

Further, since July 1, 2003, the City’s defined benefit plan has distinguished between “sworn” officers and “a Police Department recruit employed by the City and participating in the City’s Police Academy.” SDMC § 24.0103 (defining “Safety Member”). Prior to July 1, 2003, police recruits were not part of the City’s defined benefit plan, but received a retirement benefit under the City’s Supplemental Pension Savings Plan-H, which is a defined contribution plan and a Social Security replacement plan. See SDPOA MOU. Also, under state law, police recruits are not entitled to protection under the California Public Safety Officers Procedural Bill of Rights until they complete the police academy and are sworn as peace officers, as defined by the California Penal Code. *Burden v. Snowden*, 2 Cal. 4th 556, 558 (1992). Therefore, we concur with SDCERS that police recruits are not “sworn” police officers within the meaning of Proposition B, and that police recruits, who currently are defined as Safety Members under the City’s defined benefit plan, are not eligible for the defined benefit plan under Proposition B.

However, this Office concludes that the effective date of the modification of retirement benefits for police recruits is July 1, 2013. As a Charter amendment approved by City voters, Proposition B’s effective date is determined by provisions of the California Constitution and state elections law. Cal. Elec. Code § 9268. See also SDMC § 27.2808 (“The Clerk shall conduct the charter amendment initiative election in a manner conforming to other initiative elections and to the requirements of the Government Code of the State of California relating to amending charters.”). State law provides that charter amendments are effective when they are accepted and filed by the California Secretary of State.⁴ On July 31, 2012, the City received notice from the Secretary of State that Proposition B was accepted and filed by her office on July 20, 2012.

But, Proposition B expressly states that it must be implemented in a manner consistent with applicable labor relations laws, which includes the MMBA. The Council has discretion to decide certain details of the defined contribution plan, subject to the requirements of sections 140 and 150. These plan details for represented employees are subject to meet and confer.

⁴ Cal. Const. art. XI, § 3(a); Cal. Gov’t Code §§ 34450-34462. See City Att’y Report 2012-14 (June 7, 2012), at p. 5.

Proposition B also states that the implementation of various provisions may be delayed pursuant to any MOU in effect on the effective date of the Charter amendment. Section 6 of Proposition B, regarding its effective date, states:

This Charter amendment shall become effective in the manner allowed by law. This Charter amendment addresses the subject of public employee compensation and benefits under the plenary authority granted to the Citizens of San Diego by article XI, Section 5(b) of the California Constitution. As specified herein, the implementation of various provisions may be delayed in their implementation pursuant to provisions of any Memorandum of Understanding in effect on the effective date of this Charter amendment. Nothing herein is intended to remove legally established rights held by any officer or employee held by virtue of their employment status before the effective date of this Charter amendment.

On June 18, 2012, the Council approved one-year MOUs with each of its six recognized employee organizations, including SDPOA. *See* San Diego Resolution R-307515 (June 26, 2012). Each of these MOUs is in effect from July 1, 2012, through June 30, 2013.

Under the MMBA, once the Council approves an MOU, the City and the employee organization are bound to its terms. *Glendale City Employees' Assn. v. City of Glendale*, 15 Cal. 3d 328, 332 (1975). ““When agreements of employment between [a public agency] and public employees have been adopted by governing bodies, such agreements are binding and constitutionally protected.”” *Retired Employees Assn. of Orange County, Inc. v. County of Orange*, 52 Cal. 4th 1171, 1182 (2011) (quoting *Olson v. Cory*, 27 Cal. 3d 532, 538 (1980)). *See also City of San Diego v. Haas*, 143 Cal. Rptr. 438 (2012) (stating where the parties are authorized to bargain collectively under the MMBA, the MOUs they have agreed to govern their relationship, and, once ratified, the MOUs are binding and enforceable contracts).

Therefore, in implementing Proposition B, the City must comply with any MOU between the City and any recognized employee organization approved by the Council and in effect, as of the effective date of the Proposition.⁵

⁵ Each of the MOUs approved by the Council on June 18, 2012, except the SDPOA MOU, contains language that the MOU is subject to applicable laws, which includes a change in controlling law, like Proposition B as it relates to retirement benefits. Each MOU, except the SDPOA MOU, states that if any part or provision of the MOU is in conflict or inconsistent with applicable laws, which includes the Charter, then the MOU provision must be suspended and superseded by the applicable law. *See* California Teamsters Local 911 MOU, art. 33 (San Diego Resolution R-307516); Deputy City Attorneys Ass'n MOU, art. 20 (San Diego Resolution R-307512); Local 127, American Federation of State, County, & Municipal Employees, art. 4 (San Diego Resolution R-307517); San Diego City Firefighters, International Ass'n of Firefighters, Local 145, art. 5 (San Diego Resolution R-307513); San Diego Municipal Employees' Ass'n MOU; art. 34 (San Diego Resolution R-307514).

Article 44 of the SDPOA MOU provides that police recruits are entitled to accrue retirement benefits as Safety Members, from the start of their employment. The SDPOA MOU, at Article 44, states, in pertinent part:

G. 2003 Benefit Changes

Effective July 1, 2003, City agrees to amend the Municipal Code to provide Safety Member retirement status for Police Recruits on day one of the police academy.

SDPOA MOU, art. 44, ¶ G.

Presently, the City's defined benefit retirement plan, which is administered by SDCERS, defines "Safety Member" to include police recruits. *See* SDMC § 24.0103. The City must comply with this definition for the duration of the one-year SDPOA MOU. However, during this time, to implement Proposition B, the City must negotiate a new defined contribution plan for police recruits, that will be effective July 1, 2013.

Proposition B also modifies the City's defined benefit retirement formula for sworn police officers hired after the effective date of section 141.1. It provides:

Notwithstanding any other provision of this Charter, or any ordinance or other action taken pursuant hereto, the maximum amount of retirement benefit payable to a sworn police officer, who is hired after the effective date of this section and who is a participant under the Defined Benefit Pension Plan, shall be an amount equivalent to 80% at age 55 of the average of the participants' highest consecutive 36 months of Base Compensation as defined by Section 70.1. The maximum set by this provision shall decrease by 3% (three percentage points) for each year that such participant retires before age 55.

The City's current defined benefit formula for police officers hired on or after January 1, 2012, is capped at ninety percent of the officers' final compensation. SDMC § 24.0403. Final compensation for these officers is also determined by the average of the officer's three highest years of base compensation at any time during membership in SDCERS. This benefit formula was negotiated with the SDPOA, and is set forth in the SDPOA MOU. SDPOA MOU, art. 44, ¶ I.

Proposition B modifies the defined benefit formula for new sworn police officers. It provides that final compensation is based on the average of an officer's highest *consecutive* thirty-six months of base compensation, as base compensation is defined by Charter section 70.1, added by Proposition B. This provision in Proposition B cannot be implemented until after the

current SDPOA MOU expires, because the City must provide the negotiated benefit for sworn officers hired under the current SDPOA MOU. The Proposition B retirement plan modifications for SDPOA-represented employees will take effect July 1, 2013, and the City must negotiate impacts of the modification.

CONCLUSION

New police recruits, who are not sworn police officers, within the meaning of Charter section 140, remain in the City's defined benefit plan, pursuant to the SDPOA MOU, until it expires on June 30, 2013. The City must negotiate the terms of a defined contribution plan to be in place by July 1, 2013, for police recruits hired on or after that date. The City must also negotiate the impacts of the modification to the City's defined benefit plan for new sworn officers covered by that plan, which will be in effect for sworn police officers hired after the SDPOA MOU expires on June 30, 2013.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Joan F. Dawson

Joan F. Dawson

Deputy City Attorney

JFD:cm

cc: Elaine W. Reagan, General Counsel, SDCERS

Scott Chadwick, Director of Human Resources Department

Andrea Tevlin, Independent Budget Analyst

Attachment

Opinion LO-2012-2

Doc. No.: 416607



Elaine W. Reagan

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June 26, 2012

The Honorable Jerry Sanders
Mayor of City of San Diego
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Council President Tony Young
City Administration Building
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Subject: Police Recruits

Gentlemen:

SDCERS is reviewing the recently passed Comprehensive Pension Reform Initiative ("Proposition B") to determine its impact on SDCERS' administration of the City's defined benefit retirement plan and has identified an issue that warrants the City's attention. SDCERS has determined that upon taking effect, Proposition B prohibits police recruits from joining SDCERS until they have completed the Academy and become sworn police officers.

Proposition B amended City Charter section 140 to provide: "Notwithstanding the foregoing, and except as expressly provided in this Article IX, all Officers and employees, with the exception of sworn police officers, who are initially hired or assumed office on or after the effective date of this section shall participate only in such Defined Contribution Plans as authorized by sections 150 and 151 of this Charter." (Emphasis added.)

The term "sworn police officer" is not defined in either the City Charter or the San Diego Municipal Code ("SDMC"). When a statutory term is not defined, interpretation falls under the plain meaning rule of statutory construction, giving the term its ordinary, commonplace meaning and usage. When the words of the statute are clear, the plain meaning rule provides that you do not add to or alter the words to accomplish a purpose that does not appear on the face of the statute or from its legislative history. *Burden v. Snowden*, (1992) 2 Cal.4th 556, 562.

In the *Burden* case, a City of Costa Mesa police recruit was terminated and asserted that she had been denied her rights under the police officers Bill Of Rights Act ("the Act"). Ms. Burden contended that she was a police officer covered under the Act because police departments throughout California commonly used the term "police officer" to refer to police recruits and trainees as well as sworn police officers. This practice had been in place until at least 1982 when new policies were instituted throughout California where new personnel were assigned to the classification of "police recruit" and then elevated to "police officer" upon completion of the training academy. The court found that Ms. Burden was not a police officer entitled to rights outlined in the Act. The court pointed out that police officers are authorized to use the powers of a peace officer and to engage in active law enforcement while police recruits do not exercise such powers or functions. Instead, police recruits are committed to attending the training academy on a full time basis and are not conferred with the powers of a police officer. The court explained that because there is a real and meaningful distinction between those classified as recruits and those classified as police officers, recruits are not entitled to the same rights as sworn police officers. *Id.* at 565.

Currently, the Municipal Code defines a Safety Member as "[A]ny Member who is: (1) a sworn officer of the City Police Department hired after July 1, 1946, . . . or (4) effective July 1, 2003, a Police Department Recruit employed by the City and participating in the City's Police Academy. Except as provided above, police cadets, persons sworn for limited purposes only, and all other employees of the Police Department, fire department and lifeguard service are not safety members."

The MOU for the San Diego Police Officers Association in effect on July 1, 2003 contained the following provisions:

2. Federal law mandates that all employees be covered by a qualified retirement plan or by Social Security effective July 1, 1991. This impacts the classification of Police Recruit since they do not participate in any retirement system while in the Academy. Due to this mandate, it is agreed for the classification of Police Recruit that participation in a version of the Supplemental Pension Savings Plan is mandatory until becoming sworn and being enrolled in the City Retirement System. (POA MOU at Art. 44, page 81.)

....

10. 2003 Retirement Changes

Effective July 1, 2003, the City agrees to amend the Municipal Code to provide Safety Member retirement status for Police Recruits on day one of the police academy. (*Id.* at 86.)

Before the July 1, 2003 amendments to the Municipal Code, police recruits were not entitled to safety membership in SDCERS because they were not sworn police officers. Indeed, had police

recruits been entitled to the same benefits as sworn police officers, there would have been no need to amend the definition of a Safety Member to include police recruits. Further, the MOU language quoted above, demonstrates that the City has never considered a police recruit to be a sworn police officer.

For these reasons, SDCERS interprets the amended Charter language to prohibit police recruits from becoming Members of SDCERS as of the effective date of the Charter initiative unless the City amends the Municipal Code to define the term "sworn police officer" to include a police recruit. Because defining a police recruit to have sworn police officer status could have unintended consequences, the City should consult with its own counsel on the potential consequences prior to adopting such a definition.

If the City decides not to define a police recruit as a sworn police officer, then once the City Charter Amendment becomes effective, police recruits would not be entitled to join SDCERS until they have completed the Academy and become sworn police officers. The City would then need to determine what retirement benefits would be provided to these police recruits until they are qualified to enter SDCERS membership. Because the effective date of the Charter Amendment could be as early as July, and the new term at the Police Academy begins on August 1, this issue may come to a head very quickly. Accordingly, SDCERS requests that the City resolve this issue expeditiously.

Sincerely,



Elaine W. Reagan
General Counsel/Chief Compliance Officer

EWR/lb/mrh

cc: City Councilmembers
SDCERS Board of Administration
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