

OPINION NUMBER 96-1

DATE: April 2, 1996

SUBJECT: Alleged Conflict of Interest Regarding Role of the
City Attorney at Board Adjudicator Hearings

REQUESTED BY: Lawrence B. Grissom, Retirement Administrator

PREPARED BY: Loraine E. Chapin, Deputy City Attorney

You have requested an opinion regarding an alleged conflict of interest involving the role of the Office of the City Attorney in disability hearings conducted by an adjudicator hired by the Board of Administration ("Board") for the San Diego City Employees' Retirement System ("SDCERS"). You note that the instant allegation of conflict has been raised by an applicant for disability retirement who objects to the City Attorney providing one deputy to advise the Board and another deputy to represent "The City of San Diego ("City")" in "opposing" the application.

Initially, we note that the applicant's characterization of the City Attorney's role(s) in these disability hearings is incorrect. The City Attorney no longer provides a deputy to represent the City in these hearings. Instead, the City Attorney provides two separate deputy city attorneys in response to the dual nature of the Board's fiduciary responsibilities when making benefit determinations. One deputy advises the Board in its role as the decisionmaker while another deputy assists the Board in its role as the investigator/fact finder.

In addition, the applicant mistakenly relies on 66 Op. Att'y Gen. 382 (1983), as support for his conflict allegation. This Opinion, however, is not even remotely relevant to the discussion at hand. It discusses the incompatibility of the Offices of Trustee of a School District and City Attorney. It does not address the critical issue of the dual functions of some administrative agencies and the corresponding responsibilities of such an agency's lawyers in advising the agency with respect to these dual functions.

Although we could confine ourselves to a cursory review and analysis of this Attorney General Opinion and conclude that there is no conflict of interest, we decline to do so. The frequency with which the alleged conflict issue is now being raised, its importance generally and

the recent change in the role of the City Attorney in handling disability hearings dictate a more thorough review of the issue. Moreover, in recognition of the recent change in the City Attorney's role, we have analyzed the conflict of interest allegation under both current and past practice to avoid the necessity of a second opinion request.

QUESTIONS PRESENTED

1. Current Practice. Is it a conflict of interest or a violation of due process for the City Attorney to provide one deputy city attorney to advise the Board (or a Board Adjudicator in a disability retirement hearing) in its role as a decisionmaker and to also provide another deputy city attorney to represent the Board in its role as an investigator/fact finder at a disability hearing conducted by a Board Adjudicator?
2. Past Practice. Is it a conflict of interest or a violation of due process for the City Attorney to provide one deputy city attorney to represent the appointing authority and another deputy city attorney to represent the Board Adjudicator at a disability hearing conducted by the Board Adjudicator?

ANSWER

No. It is not a conflict of interest or a violation of due process for one deputy city attorney to act as a legal adviser to the Board (or one of its adjudicators) in its role as a decisionmaker while a second deputy assists the Board in its role as an investigator/fact finder. It is also not a conflict of interest or a violation of due process for the City Attorney to provide one deputy to represent the appointing authority and another deputy to represent the Adjudicator at a hearing conducted by the Adjudicator.

In either situation, however, there must be procedures in place to screen the deputies involved from inappropriate contact. In this regard, appropriate procedures are and have been in place to screen these deputies from inappropriate contact on any application for disability retirement referred to an Adjudicator for hearing.

BACKGROUND

A. SDCERS Generally

SDCERS is a tax qualified, charter created public retirement system for the employees of the City and the Unified Port District ("UPD"). It is a contributory system where the contributions to fund the System are paid by the City, the UPD and their respective employees. All funds for SDCERS, required to be segregated from City funds, are placed in a separate trust fund under the exclusive control of the Board. These trust funds may only be used for SDCERS purposes. San Diego City Charter ("Charter") Sections 141, 145.

Established as an independent entity, SDCERS is managed by a thirteen-member board. Pursuant to Charter section 144, the Board has the sole authority to determine the rights to benefits from the System, administer the retirement system, and invest the SDCERS trust fund. See also *Bianchi v. City of San Diego*, 214 Cal. App. 3d 563, 571 (1989).

Included within the Board's authority is the power to "establish such rules and regulations as it deems proper." Charter Section 144; *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 38-39 (1979). The Rules of the Retirement Board of Administration, so enacted, supplement the relevant provisions of the Charter (Charter Sections 141-148.1) and the San Diego Municipal Code ("SDMC") (Sections 24.0100-24.1312). In addition, the Board is authorized to hold hearings to determine questions presented to it involving the rights, benefits, or obligations under the Retirement System. SDMC Section 24.0908.

As a matter of necessity and longstanding practice, the Board has delegated its authority to hold hearings to an Adjudicator hired for this purpose. The "day-to-day" management of the trust fund and the System generally has likewise been delegated to Retirement staff. As with any delegation, however, the Board has a duty to exercise general supervision over the person(s) performing the delegated matter. California Probate Code Section 16012.

The composition of the Board, set forth in Charter section 144, consists of the Auditor, the City Manager, the Treasurer, three General Members, two Safety Members, one Retired Member, an officer of a local bank and three other citizens of the City. The Board members, trustees to the SDCERS trust fund, are fiduciaries to the fund and the participants of the System. Serving without compensation, they meet once a month to conduct the official business of the Board.

Pursuant to Charter section 40, the City Attorney is "the chief legal adviser of, and attorney for the City and all Departments and

offices thereof in matters relating to their official powers and duties." Charter section 40 provides further that it is the duty of the City Attorney "either personally or by such assistants as he or she may designate, to perform all services incident to the legal department; to give advice in writing when so requested, to the Council, its Committees, the Manager, the Commissions, or Directors of any department" In recognition of this mandate, SDMC section 24.0910 provides that "the City Attorney shall designate one of his staff to advise and represent the Board of Administration in the administration of the retirement system."

B. The Disability Application/Hearing Process

Board Rule 15a, promulgated pursuant to the Board's rule-making authority, sets forth the application and hearing procedures for disability retirements. Under this procedure the applicant is required to furnish written medical reports, certificates or other documents which he or she will use to support the application. The applicant is also notified that he or she may be required to report to a licensed medical doctor of the Board's choosing for a medical examination. Rule 15a.

Retirement staff then reviews all applications. In those cases where the medical and other evidence clearly supports a recommendation for approval or denial, such recommendation will be made to the Board. Rule 15a(4). In those cases where there is a substantial conflict in the evidence, or the Board rejects the staff recommendation, the matter will be referred to a Board Adjudicator for hearing. Rule 15a(5).

At the hearing, the Board Adjudicator shall determine all factual issues raised by the application. Rule 15a(6). Legal issues are referred to the Board's legal adviser. All parties may be represented by counsel. Rule 15a(6). All testimony is under oath and recorded verbatim by a certified reporter. Rule 15a(5) and (10). All parties have the right to call and examine witnesses, to introduce exhibits, and to cross-examine opposing witnesses on any matter relevant to the issues. Rule 15a(8). As with all applications for benefits, the applicant bears the burden of proof by a preponderance of the evidence. Rule 15a(10).

After the hearing, the Board Adjudicator is required to make proposed findings of fact as to whether the applicant meets the requirements for disability retirements as set forth in Charter section 141, SDMC section 24.0501 and Board Rules 17 and 18. The Board Adjudicator must also prepare a recommended decision. The proposed findings and recommended decision are served on the Board with copies

served concurrently upon the parties. The parties have ten (10) days to submit any written objections which will be incorporated into the record to be considered by the Board. Rule 15a(6).

Upon receiving the proposed findings of fact and recommended decision, the Board may approve and adopt the findings and recommendation, require a transcript or summary of all testimony and any other evidence received by the Board Adjudicator and take what ever action it deems necessary, or refer the matter back to the Board Adjudicator for further proceedings. The sole remedy from any final Board action is judicial relief. Rule 15a(6).

C. The Board's Role in the Disability Hearing Process

The Board has two separate and distinct functions in the disability determination process. First, the Board must investigate the facts supporting the application. This is so because the Board, as a fiduciary to the trust fund and its participants, must be satisfied that the applicant has met the requirements set by the Plan Sponsor (the City Council), for the specific benefit sought. By necessity, this responsibility has been delegated to Retirement staff.F

Board members do not receive compensation for their services as Board members. Vested with the exclusive authority to manage a System with approximately 10,000 active members and 3,000 retirees and administer a trust fund now valued at over 1 billion dollars, the Board is hard pressed to finish its business in the regularly scheduled monthly meeting.

The processing of disability applications, time consuming in and of itself, is thus handled by Retirement staff who make initial recommendations to the Board. In those situations where a hearing is necessary or approved by the Board, the Board has delegated its responsibility to conduct the hearing to an adjudicator.

The final decision, however, in either situation rests squarely with the Board.

Next, the Board must decide whether the applicant is entitled to the benefit requested based upon the results of the initial investigation conducted by staff. Here, the Board sits as the ultimate decisionmaker. Although staff will have made a recommendation, it is not binding on the Board. It is the Board's responsibility to be satisfied that the applicant is entitled to the benefit sought.

The Board's dual functions when making benefit determinations are highlighted in the disability hearing process. Here, the Board, faced

with a substantial conflict in the evidence as to whether the applicant has met his or her burden of proof in demonstrating entitlement to the benefit requested, must resolve the conflict and make a decision. To satisfy its fiduciary responsibilities, the Board must continue to both investigate the application and rule upon it.

To accomplish this, the Board uses a quasi-adversarial approach to evaluate the strength and convincing force of the applicant's proof. It is considered "quasi-adversarial" because a more formal hearing procedure is used. An impartial adjudicator is hired to conduct the actual hearing. Notice of and an opportunity to participate in the hearing is provided to the applicant. All testimony is under oath and recorded. All parties have the opportunity to examine and cross-examine the evidence submitted to the adjudicator. All parties have the opportunity to file written objections to the adjudicator's proposed findings and recommendation which will become part of the official record to be considered by the Board when making its decision.

Importantly, the Board does not take the position that the application must be fought at all costs. If the applicant has met his or her burden, the Board will grant the benefit requested. If not, the Board cannot grant the benefit requested.

D. The Role of the City Attorney in the Disability Hearing Process

With respect to the disability hearings referred to an adjudicator for factual findings and a recommended decision, the City Attorney provides different attorneys to represent the separate and distinct roles of the Board when making benefit determinations. The Board's legal advisor provides advice to the Board and/or its adjudicator on the legal issues raised by the applicant or arising in the disability hearing. In this context, the deputy is advising the Board or the Board Adjudicator in the Board's role as the decisionmaker.

Due to the increased workload, there are now two deputy city attorneys assigned to exclusively handle the legal affairs of the Board and the Retirement System generally. Both of these deputies, although assigned to the Civil Division of the City Attorney's office, are housed, together with a shared secretary, in the office of the Retirement System. The City Attorney is reimbursed from the Retirement Fund for their services.

A different deputy is provided by the City Attorney to represent the "investigative/fact finding" interests of the Board at the adjudicator hearings. This deputy, assigned to handle a specific

hearing before a Board Adjudicator, has the responsibility to test the applicant's proof. This is achieved through the time-honored process of examination and cross-examination of the evidence underlying the application. This is a shift from past practice. Historically, the City Attorney would provide a deputy to represent the interest of the appointing authority at such a hearing. This proved undesirable for a variety of reasons, not relevant to the instant discussion.F

The interests of the appointing authority and the Board are not necessarily the same in the area of disability retirements. Faced with troublesome personnel issues, the appointing authority may not wish to scrutinize a specific application for disability retirement. In other instances the service retirement allowance may be greater than the disability retirement allowance which is 50% of the member's high year of salary. When this occurs, SDMC section 24.0502 provides that the member shall receive the amount of the higher service retirement.

As such, the Board's determination of the disability application for a service-eligible applicant has no impact on the trust fund. The amount of the service retirement will be paid. The significance of this lies in the tax advantages available to this member. The portion of the service allowance which is attributable to the disability award can be excluded from his or her gross income for state and federal tax purposes.

In either situation discussed above, a cash-strapped City may well decide not to scrutinize the disability application. Although these considerations may have merit from the perspective of the appointing authority, they do not address nor are they relevant to the Board's fiduciary responsibilities. The Board, as a fiduciary to the Fund and its members, must be satisfied that the applicant has met the requirements for the requested benefit. This requirement is absolute.

The deputies assigned to represent the Board's investigative interests in Adjudicator hearings are assigned to the Civil Litigation Division of the City Attorney's office. Selected on a case by case basis, these deputies, also provided on a reimbursable basis, are housed in the Litigation office several blocks away. Importantly, they are supervised by different City Attorney personnel. Finally, and of greatest importance, there is NO contact between the attorneys assigned to handle Adjudicator hearings in any specific case and the attorneys assigned to provide legal advice to the Board with respect to the handling or presentation of that specific case before the Board Adjudicator.

ANALYSIS

I. THERE IS NO CONFLICT OF INTEREST OR DUE PROCESS VIOLATION

An examination of the procedures used by the Board and the City Attorney for disability retirement hearings necessarily requires a review of both the conflict of interest laws governing public lawyers and the basic requirements of due process guaranteed by the state and federal constitutions. The Board's current and past practice with disability hearings have been evaluated in light of the legal requirements governing these areas of law.

A. Conflict of Interest Generally

The rules which govern the day-to-day ethical judgments of public lawyers are rooted in two basic bodies of law. They are the law applicable to lawyers generally and public lawyers in particular, and the law which regulates the conduct of public officials in general, and of city attorneys, county counsels and other specific public lawyers in particular. Generally, the Rules of Professional Conduct of the State Bar of California ("Rules") set forth the ethical standard for California lawyers.

Public lawyers are governed by these Rules and the ethical standards of the profession. *Santa Clara County Counsels Association v. Woodside*, 7 Cal. 4th 525, 548 (1994). In addition, public lawyers have special ethical obligations to further justice. *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d. 740, 745-746 (1985).

Other laws regulate the public lawyer's practice beyond these Rules and ethical standards. Conflict of interest laws, various statutes or charter provisions defining the role of specific public lawyers, due process and other constitutional or statutory constraints on the public entity itself fall into this category and further govern the public lawyer's conduct. With respect to city attorneys specifically, their duties are set forth and measured by the terms of the applicable charter or Government Code provision. For the City or the Board, Charter section 40 is the applicable provision.

Rule 3-600 governs the ethical obligations of a lawyer such as an elected or appointed city attorney who represents an entity (the City or an independent board of the City) rather than a natural person. In this situation, the Rule makes it clear that the client is the entity itself as embodied in the "highest authorized officer, employee, body or constituent overseeing the particular engagement." Thus, with respect

to The City of San Diego, the City Council is generally the client. With respect to the Retirement System, the Board is generally the client.

Although it is the entity itself and not its constituent parts which is deemed to be the client of the public lawyer under Rule 3-600, case law suggests that the different constituent elements of the entity may need to be represented by two or more separate lawyers in order to protect the due process rights of the individual who is subject to the administrative procedure in question. *Howitt v. Superior court*, 3 Cal. App. 4th 1575 (1992).

In this regard, the same public law office may represent different functions of an administrative agency so long as certain procedures are in place to screen the individual lawyers advising the agency with respect to these different functions. This holding is premised on the well-settled proposition that the investigative, prosecutorial, rule making and adjudicative functions in a single agency may be combined without violating due process. *Id.* at 1585; *Withrow v. Larkin*, 421 U.S. 35, 46 (1975).

B. Due Process Generally

The Fourteenth Amendment to the federal Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The California Constitution also contains due process guarantees which are broader than those in the federal Constitution. Cal. Const., Art. I, Sections 7, 15. Procedural due process^F

Originally, the term "due process" encompassed procedural protections. The protection was against judicial or administrative procedure which, by reason of denial of notice and opportunity for a hearing, resulted in an unfair deprivation of a person's property or personal rights. 7 Witkin, *Constitutional Law*, ' 481 (9th ed. 1988). Its scope has since been expanded to include "substantive" concerns as well. As such, "the Due Process Clause has been interpreted as a limitation upon the legislative as well as the judicial and executive branches of the government thus preventing arbitrary and unreasonable legislation. *Id.* This Opinion focuses primarily on procedural due process.

under either constitution, however, contemplates appropriate notice, review, and an unbiased decision maker before governmental action deprives a person of certain protected interests.

As recognized by the United States Supreme Court:

Due Process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of the erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

An almost identical balancing approach has been adopted in California. In addition to the factors noted by the United States Supreme Court in Mathews, the California Supreme Court has added "the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official." People v. Ramirez, 25 Cal. 3d 260, 269 (1979).

Importantly, courts addressing due process challenges "appropriately recognize the need for flexibility in the area of administrative procedure." Howitt v. Superior Court, 3 Cal. App. 4th 1575, 1585 (1992). As further recognized in Howitt:

Some agencies allow the decision maker to play an active role in the investigation and development of the relevant facts rather than rely on the adversary presentations of interested parties. In other contexts such as the State Bar disciplinary system, the prosecutorial and adjudicatory functions are nominally combined under the same aegis but are in reality sealed off from one another to prevent the tribunal's impartiality from being tainted. Neither of these situations necessarily violates procedural due process.

Id. (emphasis added)(citations omitted).

In short, due process is flexible. There is no precise formula to measure the process due in any specific case. Such an approach, although desirable is impossible. "The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle." *Withrow v. Larkin*, 421 U.S. at 52. Due process at the state or federal level calls only for the procedural protections demanded by the particular situation at issue. *People v. Ramirez*, 25 Cal. 3d at 268.

As further recognized by the California Supreme Court:

The extent to which due process relief will be available depends on a careful and clearly articulated balancing of the interests at stake in each context. In some instances this balancing may counsel formal hearing procedures that include the rights of confrontation and cross-examination, as well as a limited right to an attorney. In others, due process may require only that the administrative agency comply with the statutory limitations on its authority.

Id. at 269 (citations omitted).

Significantly, procedural due process does not require a trial-type hearing. This is abundantly clear at the federal level where disability claims arising under the Social Security Administration are investigated and ruled upon by the hearing officer. *Richardson v. Perales*, 402 U.S. 389, 410 (1971). Rejecting a claimed "advocate-judge-multiple-hat" allegation of impropriety, the United States Supreme Court stated: "It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts." Id. at 432.

C. Current Practice

Currently, the Board uses the services of two different deputy city attorneys from the same office to advise it with respect to its dual functions in the area of disability benefit determinations. One deputy, housed in the Retirement Office, is the Board's legal adviser. In Board Adjudicator hearings this deputy will also advise the Board Adjudicator

with respect to the legal issues arising in the hearing. Since this deputy does not sit with the Board Adjudicator, any legal issues arising during the hearing are forwarded to this legal adviser by either staff or the Adjudicator.

A different deputy handles the preparation and presentation of the specific disability matter referred to the Board Adjudicator for factual findings and a proposed recommendation. This deputy, responsible for the examination and cross-examination of the evidence submitted by the applicant, represents the Board's investigative/fact finding interests in the hearing process. Absent an actual allegation of bias, there is no presumed conflict where different governmental attorneys from the same office represent separate and distinct interests of an administrative agency.

Dual representation in the setting of administrative hearings was addressed and approved by the United States Supreme Court in *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). In *Withrow*, the Wisconsin Medical Examining Board served as both investigator of plaintiff doctor's alleged wrongdoing and as the adjudicatory body which temporarily suspended the doctor's license because of that wrongdoing. Rejecting the general proposition that dual capacity of investigator and adjudicator standing alone violates due process, the court noted:

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. at 47.

Joining in *Withrow's* conclusion, that combined investigative and adjudicative functions standing alone do not create a constitutionally unacceptable risk of bias, the California Supreme Court rejected a judge's general argument that such a combination of roles with the

Commission on Judicial Performance constituted a denial of due process. *Kloepfer v. Commission on Judicial Performance*, 49 Cal. 3d 826, 827-828 (1989). Noting that the plaintiff had failed to identify any actual bias on the part of any Commission members or provide any support for his conflict/due process allegation, the *Kloepfer* court observed that this "omission is easily understood for his the judge under investigation claim is contrary to existing authority upholding similar due-process-based challenges to administrative adjudication pursuant to procedures in which the relationship between the decision making, investigating, and prosecutorial functions is much closer." *Id.* at 833-834.

This conclusion is not without precedent. "The fact that an administrative agency is both accuser and judge is not considered to deprive the accused of due process of law." *Chosick v. Reilly*, 125 Cal. App. 2d 334, 338 (1954). Elaborating on this general proposition, the *Chosick* court noted: "We see no good reason why, this being so, the same trained personnel cannot legally advise and assist the agency in both functions if such assistance does not violate any statutory provisions and if the agency itself makes the actual decision." *Id.* at 338.

As further noted by the *Chosick* court:

Although some division between the prosecuting and adjudicating functions and personnel of administrative boards may well be desirable, no definite rules in this respect, except as to the use of hearing officers, are contained in the provisions of the Government Code relating to administrative adjudication or imposed by any decisions in this state cited by appellants or known to us.

Id. at 337-338.

Although the *Chosick* decision would appear to sanction the use of the same attorney(s) for the dual functions of an administrative agency, subsequent case law suggests that different attorneys be used for the separate functions of the administrative agency. *Howitt v. Superior Court*, 3 Cal. App. 4th 1575, 1586 (1992); *Rowen v. Workers' Comp. Appeals Bd.*, 119 Cal. App. 3d 633, 640 (1981); *Midstate Theaters, Inc. v. County of Stanislaus*, 55 Cal. App. 3d 864, 875 (1976). But see *Greer v. Board of Education*, 47 Cal. App. 3d 98, 119-120 (1975).

As recognized in *Howitt*:

A different issue is presented however, where 'advocacy' and decision making roles are combined. By definition, an advocate is a partisan for a particular client or point of view. The role is inconsistent with true objectivity, a constitutionally necessary ingredient of an adjudicator. Here, as part of an adversary process, the county counsel will be asked to advise the Board about legal issues which Board members feel are relevant in deciding whether one of his subordinates wins or loses the cases. To allow an advocate for one party to also act as counsel to the decision maker, 'perhaps unconsciously' as we recognized in *Civil Service Commission* (163 Cal. App. 3d at p. 78, fn. 1), will be skewed.

Howitt, 3 Cal. App. 4th at 1585 (citations omitted).

The concerns raised in *Howitt* have been avoided in the hearing procedure currently used by the Board. The dual functions of the Board in disability benefit determinations are handled by different attorneys in the same governmental office.F

As more fully explained below, the *Howitt* court found that the use of separate attorneys satisfied due process concerns.

These attorneys do not have any official contact regarding specific cases before adjudicators. They are assigned to different divisions of the office, housed in different locations and supervised by different personnel.

More importantly, the Board's procedures exceed those used at the federal level for the evaluation of disability claims arising under the Social Security Administration. The Adjudicator does not both investigate and rule upon the disability application. Instead, the Adjudicator sits as a neutral factfinder, charged with the responsibility to develop the facts and recommend a decision.

To assist the Adjudicator in this process, the Board, in recognition of the importance of disability retirements to those who are eligible for them, has instituted procedures which for all practical purposes mirror the protections available in a court trial. Applicants are given notice and the right to confront and cross-examine adverse

witnesses and medical evidence, the right to be represented by counsel, the right to have the proceedings recorded verbatim and the right to file written objections to the proposed findings and recommended decision prepared by the Adjudicator.

Under the procedures established by the Board, the Adjudicator's impartiality is assured by using a different attorney to represent the Board's factfinding interests at the adjudicator hearing. Thus, while the adjudicator is free to ask his or her own questions, the primary responsibility for the examination and cross examination of the applicant's proof rests with the litigation attorney hired by the Board for this purpose.

This is significant because the right of cross-examination has been termed "the greatest legal engine ever invented for the discovery of the truth." *People v. Ramirez*, 25 Cal. 3d 260, 280 (1979), quoting *People v. Fries*, 24 Cal. 3d 222, 231 (1979). As further recognized by the United States Supreme Court, "cross-examination is the principal means by which the believability of a witness and truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

In light of the foregoing, the use of different attorneys from the same governmental office for the disability hearings is necessary and appropriate. Absent any specific allegation of bias, there is no conflict of interest or due process violation in this arrangement.

D. Past Practice

Historically, the deputy city attorney handling the specific disability matter referred to a Board Adjudicator for hearing represented the interests of the appointing authority. This was changed in 1995, when the Board began using the services of the City Attorney to

represent the Board's fact finding interests in the Board Adjudicator hearing. The previous arrangement, however, also permissible, was squarely addressed in *Howitt*, 3 Cal. App. 4th 1575.

In *Howitt*, an employee at the county sheriff's department sought an administrative hearing before the county employment appeals board after he was transferred and suspended without pay. The employment appeals board was "a quasi-independent administrative tribunal established by county ordinance and charged with adjudicating certain disputes between the county and county employees." *Id.* at 1578. The Board did not have its own investigators, but instead relied on adversary presentations by the employee and the affected county agency to illuminate the relevant

facts and law. *Id.* at 1582.

At the hearing, a deputy county counsel was to represent the sheriff's department and the county counsel was to advise the Board and prepare the Board's written decision. The employee petitioned for writ of mandate in the superior court, seeking disqualification of the county counsel from advising the Board.

Framing the question presented as "whether a county counsel's office 'is ever permitted to place (it)self in (the) position' of acting as an advocate for one party in a contested hearing while at the same time serving as the legal adviser for the decision maker," the Howitt court concluded "yes," as long as certain precautions were taken. *Id.* at 1579. "Performance of both roles by the same law office is appropriate only if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate." *Id.* at 1586.

Recognizing the need for flexibility in the area of administrative procedure, the Howitt court noted that administrative proceedings can depart "from the pure adversary model of a passive and disinterested tribunal hearing evidence and argument presented by partisan advocates." *Id.* at 1581 (emphasis in original). "The mere fact that the decision maker or its staff is a more active participant in the factfinding process--similar to the judge in European civil law systems--will not render an administrative procedure unconstitutional." *Id.* To demonstrate a due process violation, there must be "specific evidence of bias." *Id.* at 1580.

On the issue of actual bias, *Ford v. Civil Service Commission*, 161 Cal. App. 2d 692, 697 (1958), is also instructive. In *Ford*, the county counsel's office served as adviser to the civil service commission and also represented the employer. Rejecting the employee's claim that there was a problem with the county counsel's representation of both the Commission and the Department, the court noted:

Appellant now insists that because the civil service commission is advised by a member of the staff from county counsel's office, and the department is also represented by another member of the county counsel's staff, that such presents a "cozy situation" and is reversible error. Whether it was cozy or dismal and cheerless makes little difference if it was entirely fair and proper. Under our law, an administrative agency can even be

both the prosecutor and the judge in the same matter. There is no evidence that the deputy county counsel who advised the commission did anything other than that which was wholly proper.

Id. at 697 (citation omitted) (emphasis added).

In light of the foregoing authority, the use of one deputy city attorney to advise the Board and another deputy city attorney to represent the appointing authority at the Board Adjudicator hearings was not only permissible but required. Absent actual bias, there was no conflict of interest or due process violation in this past practice.

II. THE DEPUTIES REPRESENTING THE DUAL FUNCTIONS OF THE BOARD IN DISABILITY HEARINGS ARE APPROPRIATELY SCREENED

It is the burden of the law office performing the dual roles to prove that the two attorneys have been appropriately screened. Howitt, 3 Cal. App. 4th at 1586-87. At page 1587, the Howitt court explained:

Generally, where a "Chinese wall" defense has been allowed in attorney disqualification cases, the burden is always on the party relying on the wall to demonstrate its existence and effectiveness. (Citation omitted).

....

If the adviser has been screened, it should be relatively easy for county counsel to explain the screening procedures in effect. On the other hand, if there has been improper contact, it would likely be known only to the lawyers involved and perhaps to the board members. A party challenging the dual representation would have virtually no way of obtaining evidence to demonstrate any impropriety.

In a footnote, the Howitt court noted that it did not "envision that an adequate screening procedure for due process purposes requires the creation of functionally separate offices to advocate and advise. It should be sufficient if the lawyer advising the Board has no potential involvement in or responsibility for the preparation or

presentation of the case." Id. at 1587 n.4.

In the present case, steps exceeding those required by law have been taken to ensure that the deputy city attorney advising the Board or its Adjudicator in a particular case has no contact with the deputy city attorney handling the hearing before the Board Adjudicator. Importantly, there is no contact between these deputies on the preparation or presentation of any specific matter scheduled for hearing before the Board or one of its Adjudicators. Although not required, these deputies are housed in separate locations, assigned to separate divisions in the office and supervised by different personnel.

In light of the foregoing, the City Attorney has met his burden in demonstrating that the screening procedures required by Howitt are and have been in place. There is no, nor has there been any, due process violation in the hearing procedures utilized by the Board for disability retirement applications.

SUMMARY

Under the Charter, the Board has the sole authority to manage the Retirement System, administer the trust fund, and make benefit determinations. With benefit determinations, the Board has two functions. First, it must investigate the facts underlying the application for a requested benefit. Second, it must actually decide whether the applicant has met his or her burden in meeting the requirements set by the City Council for the award of the benefit requested. This duty is owed not only to the person seeking the benefit but to all of the other beneficiaries and members of the trust under the Board's watchful eye.

The City Attorney provides legal services to the Board. In the context of Board Adjudicator hearings, the City Attorney's services address the dual nature of the Board's fiduciary responsibilities. Housed in different locations, supervised by different personnel, assigned to separate divisions in the office and trained to abstain from any contact in the preparation or presentation of any given case, these attorneys enjoy a working environment conducive to the screening principles required by the courts.

The fact that the City Attorney provides different deputies to assist the Board in its dual roles is not, standing alone, a conflict of interest or a violation of due process. So long as appropriate safeguards are in place to prohibit inappropriate contact between the attorneys representing the dual interests, such a relationship is not

only permissible but required.

Here, the hearing procedure used by the Board exceeds the legal requirements used for similar administrative adjudications at the federal level. Employing a trial-type hearing process, the adjudicator hearing used by the Board allows for a full and fair presentation of the facts and circumstances supporting the disability applications. It satisfies the Board's fiduciary responsibility to ensure that benefits are only awarded to those who are entitled to them. Finally, and of greatest importance, it satisfies the basic requirements for due process of law.

Respectfully submitted,

JOHN W. WITT, City Attorney

By
Loraine E. Chapin
Deputy City Attorney

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APPROVED:

JOHN W. WITT
City Attorney