MEMORANDUM OF LAW

DATE: February 10, 1992

TO: Larry Grissom, Retirement Administrator
FROM: City Attorney
SUBJECT: San Diego Municipal Code Section 24.0510 "Periodic Physical Exams of Disability Retirees"

You have asked for an interpretation of San Diego Municipal Code ("SDMC") section 24.0510 regarding "Periodic Physical Exams of Disability Retirees." SDMC section 24.0510 provides:

Section 24.0510 Periodic Physical Exams of Disability Retirees

> The Board of Administration shall prescribe rules and regulations providing for periodical physical examination of any member, including a safety member, who has been retired for disability, industrial or non-industrial, and may at any time prior to the time or before such member reaches the minimum age of voluntary retirement order such employee to active duty, in which case said disability retirement allowance shall cease.

In particular, you have expressed concern with the language in that section that the Retirement Board may "order" a disability retiree who is no longer disabled "to active duty." Suggesting that "this language appears to be permissive" you request an interpretation of SDMC section 24.0510 in light of specific questions. Your questions and our responses follow.

Question No. 1: Can the Retirement Board find an individual no longer disabled and terminate their ┌sicσ disability benefit without ordering them to return to active duty?

Answer: No. As currently drafted, SDMC section 24.0510 requires that the Retirement Board "order" the employee to active duty before terminating his or her disability retirement allowance. In 1958 this office was asked to review the rights of an employee to be reinstated to active duty following disability retirement pursuant to Section 42 of the Retirement Ordinance (the predecessor to SDMC section 24.0510). The language in these sections is identical. At that time, we noted that Section 42 of the Retirement Ordinance:

> ┌Iσmposes a duty upon the ┌Retirement Boardσ

> to maintain a check upon the physical condition of persons retired due to disability. This section also imposes a duty upon the Board to order employees to active duty in the event their disability should cease to exist. These provisions are for the benefit of the City and certainly should be exercised under the proper circumstances.

Letter dated December 15, 1958, from Assistant City Attorney, Aaron W. Reese to The Board of Administration City Employees' Retirement System.

In light of the foregoing, the Board is required to order the former employee to active duty before terminating his or her disability retirement.

Question No. 2: Can the Board find an individual no longer disabled and not terminate their ┌sicσ disability benefit, regardless of whether or not they return to work?

Answer: No. The assets of the Retirement System are trust funds. They are to be held for the exclusive purposes of providing benefits to participants in the retirement system and their beneficiaries and defraying reasonable expenses of administering the system. The Retirement Board members are trustees over these trust funds. They have fiduciary responsibilities to both the trust fund and the pensioners-beneficiaries of the trust.

Disability retirement is a benefit provided for members of the system that can be exercised under certain conditions. A finding of permanent incapacity from the performance of duty is one such condition. The obvious intent of this benefit is to provide income for eligible members who become physically unable to continue their employment.

However, it is equally obvious that the intent of disability retirement benefits is not to confer an advantage upon a person who has been retired because of physical disability in the event he or she should regain their previous physical status and become able to return to gainful employment. Thus, if the Retirement Board were to find that a disability retiree who has not yet reached the minimum age for retirement were no longer disabled, the Retirement Board would be obligated to discontinue the disability allowance pursuant to its fiduciary responsibilities to the trust and its pensioners-beneficiaries.

Furthermore, while it is true that the Retirement Board is the sole authority and judge of the conditions under which persons may be admitted to benefit of any sort under the Retirement System (San Diego City Charter section 144), this power is conditioned upon and subject to the ordinances as may be adopted by the City Council. The Retirement Board must therefore exercise its powers under the Charter and SDMC. SDMC sections 24.0501 and 24.1120, which authorize disability retirements, require a determination by the Retirement Board that the member is in

fact incapacitated from the performance of duty before that member can receive a disability retirement allowance. As such, a finding that the member is no longer incapacitated cannot support continuance of a disability retirement allowance.

Question No. 3: Does this section give the Board the authority to require a City department to put an individual back on active duty irrespective of the Department's desire to do so?

Answer: No. SDMC section 24.0510 does not give the Board the authority to put an individual back on active duty irrespective of the Department's desire to do so. The Retirement System and The City of San Diego are two separate entities. The Retirement System operates with complete autonomy, both in its exclusive control over the trust funds and in its operations as a contributory, actuarially based system. Bianchi v. City of San Diego, 214 Cal. App. 3d 563, 571 (1989).

Each has its own unique set of policies, procedures, rules and regulations. Lacking either privity or an agency relationship with the City, it becomes apparent that the Retirement Board does not have the "power" to compel any City department, or for that matter, the Unified Port District ("UPD") to reinstate an employee previously retired for disability. Such a power would likewise be inconsistent with its stated duties and responsibilities. Quite simply, the Retirement Board only has the power to terminate a disability retirement allowance where the member is no longer incapacitated. Sound fiduciary principles require this result. The decision to reinstate, however, rests with the appointing authority involved. They must exercise their decision in accordance with the principles they have established.

Please be advised that in reaching this conclusion we are mindful of the letter written by this office in 1958 referenced earlier in this Memorandum of Law which stated that when the Retirement Board ordered an employee to be returned to active duty pursuant to Section 42 of the Retirement Ordinance (the predecessor to SDMC section 24.0510), there was an implied duty upon all City departments to assist in carrying out such provisions. The implied duty to accommodate the Retirement Board's request to return to active duty, however, does not confer upon the Retirement Board the power to compel compliance.

Practically speaking, however, a decision by the UPD or City department to not take the individual back to active employment after a request to do so by CERS would most likely result in litigation against both CERS and the appointing authority involved. In such a situation, the aggrieved employee would find himself or herself in an unfortunate "catch-22" predicament. His or her disability benefit would presumably be terminated. In addition, he or she would be unemployed. Faced with a scenario such as this, it is doubtful that the court would rule against the employee. A more likely outcome could find CERS justified in

terminating the disability allowance with the appointing authority not justified in rejecting the person for employment. It is also possible that the court would rule against CERS or both CERS and the other entity involved.

The matter is further complicated by the Americans with Disabilities Act of 1990, Public Law 101-336, 42 U.S.C. Section 12101 et seq. ("ADA"). The ADA is a comprehensive anti-discrimination statute that prohibits discrimination against disabled individuals in private and state and local government employment, public accommodations, public transportation, state and local government services, and telecommunications. The ADA consists of five titles. Title I of the ADA, which is enforced by EEOC, prohibits employment discrimination against qualified disabled individuals. It becomes effective July 26, 1992.

Under Title I, employers, including state and local governments are prohibited from discriminating against a "qualified individual with a disability" because of the disability, in regard to job application procedures, hiring, advancement, discharge, compensation, training, or other terms, conditions, or privileges of employment. The City is clearly an "employer" under the ADA. Although CERS does not appear to fit within the definition of "employer" or "covered entity" within the Title I definitions of ADA, the impact of the ADA on CERS practices and procedures with respect to disability applications in general remains unknown. Analysis of this new law is ongoing. Any information with respect to the impact of the ADA on CERS will be provided upon receipt of same.

In light of the confusion generated by SDMC section 24.0510 as it presently reads and the potential impact on disability applications in general due to the recent enactment of the ADA, we recommend that this section be revised to indicate more clearly the Retirement Board's duties and responsibilities with respect to re-examination and reinstatement requests involving disability retirees.

Question No. 4: Does the Board's authority extend far enough to cause layoff?

Answer: No. See response to Question No. 3.

Question No. 5: What rights does the individual have?

Answer: The individual has a right to a disability retirement allowance assuming all required conditions have been satisfied. The individual also has the right to continued receipt of the disability retirement allowance as long as he or she remains permanently incapacitated from the performance of duty. As a retired employee, however, the individual is no longer protected by the relevant Civil Service Rules and Regulations governing the affairs of active City or Unified Port District employees.

Charter section 115 states that the Civil Service Commission "shall

have supervision over the selection, promotion and removal of all employees of the City subject to the Civil Service provisions of this Charter." Charter section 117 divides City employment into two categories: classified and unclassified. No provision is made for retirees. In addition, Civil Service Rules and Regulations make no reference to retirees or requests from retirees, retired for disability or service, in their rules and regulations governing "eligible lists" or reinstatement requests.

Rule IV, Section 5 of the Personnel Regulations governs reinstatement requests. It provides in pertinent part:

> (1) Any employee who has served satisfactorily and presently fulfills the minimum requirements for the classification, and who, without fault or delinquency on his/her part, resigns or demotes from his/her position, may request reinstatement to the eligible list for any class in which such service was rendered, and/or to the eligible list for a comparable or lower class in the same occupational group.
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> The request for reinstatement may be made immediately upon demotion, reduction in status, resignation, or termination and must be made within one year from the date of such action.
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> (2) Any permanent or probationary employee who has served satisfactorily and is demoted, reduced in status, or terminated as part of an official layoff may, within 60 calendar days of the date of official layoff, request reinstatement to the eligible list and for any comparable or lower class for which the employee meets the minimum requirements at the time of layoff.

In light of the foregoing, it is clear that a disability retiree does not have any right to reinstatement or re-examination under the Civil Service Rules and Regulations.

With respect to the situation where the individual has been previously retired for disability and seeks re-examination for the purpose of pursuing a return to employment, the authority and discretion to require or ask for re-examinations under SDMC section 24.0510 or Board Rule 19-A promulgated pursuant to SDMC section 24.0510 rests exclusively with the Retirement Board and not the individual. This conclusion is based on the exacting process the Retirement Board engages in when initially processing applications for disability retirement. The purpose

for the re-examination is to enable the Retirement Board to determine if and whether a disability retiree is capable of physically unencumbered employment at a future date should age and circumstances so warrant. An applicant for disability retirement cannot, on one hand, seek a disability retirement pension and on the other hand, concurrently ask to be re-examined at a later date. There is no legal authority for this proposition or procedure.

SDMC section 24.0510 imposes a duty upon the Retirement Board to prescribe rules and regulations providing for periodical physical examination of members who have been retired for disability, industrial or non-industrial. As it reads presently, Board Rule 19-A vests authority with the Retirement Board to authorize re-examinations if the Retirement Board deems it appropriate under the circumstances of any given case. Under this rule, a hearing before a Board Adjudicator is contemplated if the results of a medical re-examination indicate the retiree is no longer permanently incapacitated from the performance of duty. Board Rule 19-A provides further that " ┌tσhe member's disability retirement allowance will remain in effect until such time as the Retirement Board takes action on the Board Adjudicator's findings of fact and recommendation."

Effective June 21, 1991, the Board adopted a new policy concerning disability re-examinations. Under the new policy unanimously adopted by the Retirement Board:

1. It is the general policy of the Board not to initiate re-exams of disability retirees and not to approve requests for re-exam initiated by individual disability retirees.
2. The Board, through its Business and Procedures Committee or other committees as may be formed in the future for this purpose, may make exception to its evidence to substantiate that a medical cure has been developed and utilized to correct the disabling condition, remission or rehabilitation.
3. The cost of the initial medical exam to support a request for re-exam made by a disability retiree be done by the individual.

In light of the foregoing, the individual disability retiree does not have any right to re-examination or reinstatement. Exceptions to this rule are handled on a case by case basis. Board Rule 19-A will need to be revised to reflect the Retirement Board's current policy in this area.

CONCLUSION

SDMC section 24.0510 imposes a duty upon the Retirement Board to

order a previously disabled-no longer incapacitated employee to active duty before discontinuing that employee's disability retirement allowance. This duty to order the employee to active duty, however, does not empower the Retirement Board to compel compliance. The decision to reinstate such an employee rests with the sound discretion of the appointing authority involved.

As such, an employee previously retired for disability who has later been found by the Retirement Board to be no longer incapacitated could find himself or herself in an unfortunate "catch-22" situation. On one hand, the Retirement Board would be obligated to discontinue the retirement allowance. On the other hand, the City department or UPD could decide not to reinstate that employee.

In this regard, the language set forth in SDMC section 24.0510 requires revision to reflect the Retirement Board's current procedures for periodical physical examinations, the scope of the Retirement Board's authority with respect to request for re-examination and reinstatement and the parameters for any decision to discontinue a disability retirement allowance. In addition, Board Rule, 19-A, must also be revised to reflect the Board's current policy on the subject of requests for re-examinations and reinstatements.

I hope this has addressed your concerns. Please contact me if you need further clarification.

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By
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