



Hand Delivered

December 16, 2004

Michael J. Aguirre
Office of the City Attorney
1200 Third Avenue, Suite 1620
San Diego, CA 92101

Dear Mr. Aguirre:

This is in response to your December 15, 2004 letter in which you indicate that you wish to assume the role of the chief legal advisor to the Board of Administration of the Retirement System. You also indicate in your letter that all legal counsel currently working for SDCERS must now report to the City Attorney's office for further assignment.

Your interpretation of the San Diego Municipal Code, the City Charter and other relevant provisions and applicable laws of the State of California regarding this issue is incorrect. Furthermore, you have failed to address other controlling legal principles which the City Council has long recognized necessitate that SDCERS be advised by separate and independent legal counsel. Finally, your letter does not state that your attempt to remove SDCERS' legal counsel was done pursuant to an order of the City Council. Therefore, your action exceeds your powers under the City Charter.

Regarding the statements made in your letter, we specifically do not agree that you have the authority to commandeer the legal counsel employees of SDCERS, and either dismiss them or reassign them. We intend to more fully respond to the legal assertions in your December 15, 2004 letter, and will do so as soon as we can review your claims with our Board of Administration. However, until such time as that response has been prepared, please be advised that all legal counsel currently working for SDCERS will continue to work for SDCERS.

Also, for all Retirement Board matters until this issue is resolved, including the Retirement Board meetings today and tomorrow, our General Counsel and her legal staff will remain the legal advisors to the Board for these meetings. You are certainly welcome to send a City Attorney to observe these meetings as they are open to the public.

Sincerely,

Frederick W. Pierce IV
President, Board of Administration

Lawrence B. Grissom
Retirement Administrator

cc: Honorable Mayor Murphy and Members of the City Council



MICHAEL J. AGUIRRE
SAN DIEGO CITY ATTORNEY

SDCERS
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December 15, 2004

Lawrence Grissom
Retirement Administrator
San Diego City Employees Retirement System
401 B Street, Suite 400
San Diego, CA 92101

RE: City Attorney As Legal Advisory to Board of Administration
Per City of San Diego City Charter Section 40

Dear Mr. Grissom:

Effective immediately the undersigned assumes the role of chief legal advisor to the Board of Administration of the Retirement System.

All counsel currently serving the board in a legal advisory capacity are immediately discharged from those duties, and directed to contact Richel Thaler in the office of the City Attorney for further information and/or assignment. All personnel identifications and office access devices are to be turned in to you immediately. All files and office materials, including computers, are to remain in the respective offices of these former counsels, and not removed or altered in any way unless and until you receive specific directions from me in that regard.

Background:

The City Employees' Retirement System (sdCERS) is governed by Article IX, Sections 141 through 148.1 of the City of San Diego City Charter, other relevant Charter provisions and all applicable laws of the State of California. Originally established in 1927, the City created the fund without a separate trust agreement. The City Treasury holds the monies of sdCERS.

City of San Diego City Charter Section 40 provides, in part, for the office of the City Attorney, as follows:

“The City Attorneys shall be the chief legal advisor of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties. . . .

It shall be the City Attorney’s duty, either personally or by such assistants as he or she may designate, to perform all services incident to the legal department; . . .”

In recognition of this Charter mandate, San Diego Municipal Code Sec. 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.”

City of San Diego City Charter Section 40 further provides, in part, as follows:

“The City Attorney shall have charge and custody of all legal papers, books and dockets belonging to the City pertaining to his office. . . .”

Prior to 1998, the office of the City Attorney provided legal services to the Board by assigning deputy City Attorneys to give day-to-day legal advice on a variety of issues. By 1998, sdCERS sought to replace the City Attorney with a “General Counsel” to the Board of Administration, separate from the control and oversight of the City Attorney. Notwithstanding the clear conflict with the Charter, and the possibility for behavior inconsistent with the interests of the people of the City of San Diego, it argued its rights to do so under California Constitution Article XVI, section 17 (Proposition 162), which was read by sdCERS to grant to it plenary (argued to mean exclusive and unfettered) authority over the System.

The City Attorney did not concur with the Board’s analysis of the applicable law, but capitulated to the Board’s demand. On November 10, 1998, an ordinance was passed which: 1) specifically reflected the position of the Board demanding the right to appoint its own separate General Counsel and achieve the repeal of Municipal Code Sec. 24.0910; 2) specifically reflected the objection of the City Attorney to the Board’s desire to repeal the Municipal Code provisions for City Attorney’s participation as mandated by the Charter; and 3) resolved the matter by providing for the option of a General Counsel position to the sdCERS Board under a Memorandum of Understanding between the City Attorney and the Board. Municipal Code Sec. 24.0910 was adopted specifically retaining the City Attorney’s Charter rights as legal counsel to the Board but also providing for the alternate General Counsel(s) under a Memorandum of Understanding.

On or about July 22, 1998 , the City Attorney and the Board executed a Memorandum of Understanding allowing the Board to retain its own legal services department; however, that same MOU specifically reserved the City Attorney’s rights under the Charter and Municipal Code “regarding his rights and responsibilities to the Retirement System under Section 40 of the City Charter.”

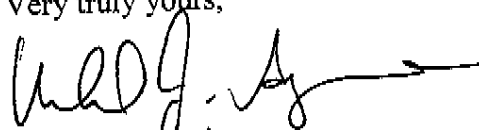
There was no term to the Memorandum of Understanding agreement.

The undersigned City Attorney discontinues any effect of the above-mentioned MOU and assumes the role of chief legal advisor to the Board of Administration of the Retirement System effective immediately, on the following grounds, among others:

1. The decision of the prior City Attorney to abdicate his role under the Charter and the relevant Municipal Codes was legal error. Municipal Codes and Memorandums of Understanding do not allow for the abdication of the City Attorney's right to serve or responsibility to serve, in the role of legal advisor to the Board of Administration.
2. In the absence of a term in the 1998 MOU between the City Attorney and the Board, the term is confined to that of the last City Attorney and the undersigned declares the term to have expired.
3. The law of the State of California regarding the extent of the powers of a Retirement Board Under California Constitution Article XVI, section 17 (Proposition 162) has since been clarified in *Westly v. CALPERS*, 130 Cal. Rptr. 2d 149 (Calif App. 2003), (Appealed to the California Supreme Court 3/11/03; Review denied and request to depublish, Denied 2003 Cal. LEXIS 2690). That opinion confirms that such Boards only have very limited plenary powers over matters essential to the administration of the retirement system. The opinion dramatically limits the asserted expanded powers of such boards, especially in the face of regulatory and administrative efforts of municipal plan sponsors and contributors. Specifically, the Board does not have the authority to engage in administrative actions that conflict with other applicable legal authority. In that regard, Municipal Code Section 24.0910 does not deprive, or limit, the City Attorney from acting as the chief legal advisor to the Board under City of San Diego City Charter Section 40, and the undersigned asserts his right to so serve.

Thank you for immediately effectuating the directions in this letter.

Very truly yours,



Michael J. Aguirre
San Diego City Attorney

cc: Fredrick W. Pierce
Lorraine Chapin, Esquire