

**REPORT OF SAN DIEGO
CITY ATTORNEY MICHAEL J. AGUIRRE
REGARDING WHETHER THE SAN DIEGO
CITY ATTORNEY IS COUNSEL TO THE SAN DIEGO
CITY EMPLOYEES' RETIREMENT SYSTEM**

**OFFICE OF
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I.

BACKGROUND

On 15 December 2004 the San Diego City Attorney assumed the role of chief legal advisor to the Board of Administration of the San Diego City Employees' Retirement System ("SDCERS"). The City Attorney acted by virtue of his authority under Charter §40 of the San Diego City Charter. Charter §40 provides in pertinent part that the "City Attorney shall be 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...."¹

Municipal Code §22.1801 was adopted under Ordinance No. 8969 identifying City Retirement as a department of the City.² Thus, the San Diego City Attorney acts as legal counsel for City Retirement.³ The San Diego Municipal Code provides that, unless otherwise provided by a memorandum of understanding between the City Attorney and the Board of Administration, "the City Attorney will designate one or more Assistant or Deputy City Attorneys to advise and represent the [SDCERS] Board in the administration of the System."⁴

¹ San Diego City Charter §40, attached as Exhibit 1.

² Ordinance No. 8969 adopted 25 February 1964, attached as Exhibit 3.

³ San Diego City Municipal Code §22.1801 (b), attached as Exhibit 2.

⁴ San Diego City Municipal Code §24.0910 states: "Legal Advisor to Board of Administration. Unless otherwise provided by Memorandum of Understanding between the City Attorney and the Board of Administration, the City Attorney will designate one or more Assistant or Deputy City Attorneys to advise and represent the Board in the administration of the System." ("Legal Advisor to Board of Administration" repealed; "Legal Advisor to Board of Administration" added 4-2-2002 by O-19043 N.S.), attached as Exhibit 4.

On 22 July 1998 the San Diego City Attorney and the SDCERS Board entered into a written Memorandum of Understanding “Regarding The Provision of Legal Services to the Board” (“22 July 1998 MOU”).⁵ The San Diego City Attorney on 15 December 2004 revoked the 22 July 1998 MOU in a letter from the San Diego City Attorney to the SDCERS Board administrator.⁶

Notwithstanding the clear and unambiguous actions of the San Diego City Attorney to assert his authority under San Diego City Charter §40 to act as legal counsel for SDCERS, the Board of SDCERS refused to conform its actions to the requirements of Charter §40. The Board refused to allow the duly elected San Diego City Attorney to act as legal counsel to SDCERS. Instead, on 27 January 2005 the SDCERS Board brought a legal action in San Diego County Superior Court against the San Diego City Attorney asserting that the City Attorney was not authorized to act as legal counsel to SDCERS. By virtue of the fact that the SDCERS legal action has been pending since 27 January 2005, the San Diego City Attorney has been unable to exercise the power and authority granted him under Charter §40 to represent SDCERS. The SDCERS Board maintains⁷ it is empowered to appoint the attorney for SDCERS, despite the Charter provision assigning to the people of the City of San Diego the authority to name the attorney for all City departments.⁸

⁵ 22 July 1998 Memorandum of Understanding between the San Diego City Attorney and the SDCERS Board, attached as Exhibit 5.

⁶ 15 December 2004 letter from the San Diego City Attorney to the SDCERS Administrator, attached as Exhibit 6.

⁷ See, SDCERS civil action complaint against the San Diego City Attorney p. 12, attached as Exhibit 7.

⁸ See San Diego City Charter §40, attached as Exhibit 1.

The San Diego City Attorney is elected by the people of the City of San Diego.⁹ The composition of the SDCERS Board also is determined by an election of the voters of the City of San Diego.¹⁰ The voters of the City of San Diego expressly decided on 7 April 1931 that the City Attorney was to be elected by the people of San Diego, as opposed to being appointed.¹¹

On 6 December 2004 the current San Diego City Attorney took office.¹² The current San Diego City Attorney attempted to exercise his authority under Charter §40 upon his election. The SDCERS Board has failed and refused to obey the clear terms of San Diego City Charter §40, which places the authority to act as legal counsel to the pension board in the hands of the elected San Diego City Attorney.¹³

II.

THE CITY ATTORNEY REPRESENTED SDCERS FROM ITS INCEPTION IN 1926

On 29 November 1926 the Common Council of the City of San Diego unanimously adopted Ordinance No. O-10792 establishing “a retirement system for employees of The City of

⁹ San Diego City Charter §40, attached as Exhibit 1.

¹⁰ California State Constitution Article 16, §17(f) provides in relevant part that the number, terms, and method of selection or removal of members of public retirement board shall not be changed, amended, or modified unless ratified by a majority vote of the electors of the jurisdiction in which the participants of the system are or were, prior to retirement, employed, attached as Exhibit 8.

¹¹ See 7 April 1931 election returns for Proposition I, attached as Exhibit 9. The vote was 22,727 (79.76) in favor to 5,767 (20.24%) against.

¹² 6 December 2004 Certificate of Election of Michael J. Aguirre as San Diego City Attorney, attached as Exhibit 10.

¹³ Complaint filed in SDCERS action against the San Diego City Attorney (Case No. 841845), attached as Exhibit 7.

San Diego.”¹⁴ The San Diego City Attorney was made the attorney for the pension plan by the Common Council under Ordinance No. O-10792:

Legal Adviser

(6) The City Attorney of the City of San Diego shall be the legal adviser of the Board of Administration.¹⁵

III.

UNDER THE 1931 SAN DIEGO CITY CHARTER THE CITY ATTORNEY CONTINUED AS ATTORNEY FOR THE PENSION BOARD

Drafters of the 1931 Charter of the City of San Diego explicitly continued the provisions of the previous pension system under Charter §148, which provided in pertinent part that it was the intent of the drafters to continue the pension system “in force and effect as existing at the time this Charter is adopted.”¹⁶

Moreover, the new Charter made the San Diego City Attorney the attorney for all departments and offices of the City.¹⁷ The 1931 Charter expressly provided that: “The City Attorney shall be 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...”¹⁸

The City Attorney is not empowered to delegate his duty to represent the SDCERS Board. In adopting Charter §40 the voters made it clear that they wanted the City Attorney to act

¹⁴ See Ordinance No. 10792, 29 November 1926, attached as Exhibit 11.

¹⁵ See Ordinance No. 10792, 29 November 1926 p. 9, attached as Exhibit 11.

¹⁶ San Diego City Charter §148, attached as Exhibit 12.

¹⁷ San Diego City Charter §40, attached as Exhibit 1.

¹⁸ Charter §40, attached as Exhibit 1.

as the attorney for all departments and offices of the City. Under California law when such a delegation is made clear, it may not be avoided:

When the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization.¹⁹

Powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated. Thus, the power of the municipal corporation or of its officers or agents to create positions cannot be delegated.²⁰

In preparation for the 22 July 1998 MOU, the former City Attorney's Office analyzed the duties of the City Attorney to SDCERS as mandated by the City Charter. The City Attorney's Office considered:

If we are not their [attorney] per Ch §40, then

- 1) we can't [contract] away (or MOU away) anything, but
- 2) they have no basis for requiring us to provide any legal services...

Fact that [Municipal Code] contemplates hiring outside counsel for [investment] purposes, then acknowledges that the City [Attorney] designates his person to be the Board's advisor, suggests that the [interpretation] of independent counsel is for investment advice.

BUT

If we are the Board's [attorney] per Ch §40, then we have a duty and a mandate under the Muni Code. That Muni Code allows outside investment counsel, but no other. It does not say "outside counsel for any purpose.["]²¹

¹⁹ *Bagley v. Manhattan Beach*, 18 Cal. 3d 22, 24 (1976). Attached as Exhibit 13.

²⁰ *McQuillin Mun. Corp.* § 12.72 (3d ed.), attached as Exhibit 14.

²¹ See Deputy City Attorney notes dated 20 March 1998, attached as Exhibit 43.

The City Attorney's Office thus concluded, months before entering the MOU, that it had a nondelegable duty under Charter section 40 to advise the retirement board. Counsel that may be retained by the Board, if any, pertains exclusively to counsel on investments. Notwithstanding, the then City Attorney entered into an MOU in July 1998 for others to perform his nondelegable duty to advise the retirement board.

IV.

THE CITY ATTORNEY IS ELECTED TO MAXIMIZE THE CITY ATTORNEY'S INDEPENDENCE FROM ANY APPOINTING AUTHORITY

The City Attorney was made an elected office by the 1930-1931 Charter Commission in order to keep the City Attorney independent. The Charter Commission was convinced by proponents of an elected City Attorney that putting the citizenry in charge of selecting the City Attorney would maximize the City Attorney's independence. This decision was made after considerable consultation with lawyers of the City of San Diego.

News stories and minutes of the 12 November 1930 Charter Commission meeting demonstrate that proponents of an elected City Attorney sought to maximize the City Attorney's independence. The local bar supported the theory that an elected City Attorney would be more independent than an appointed City Attorney, according to Charter Commission records. One news article of 12 November 1930, quoted in part below, explained that proponents of an elected City Attorney thought election would ensure that the City Attorney would be more independent:

LAWYERS ARE ASKED TO AID FREEHOLDERS

7 TO 7 Deadlock On City Attorney Will Be Put To Attorneys

Local attorneys are invited to attend the meeting of the board of freeholders in the director's room of the San Diego Museum Balboa park, tonight at 7 o'clock to help the charter framers solve this question:

Under the new charter, should the city attorney be elected by the people or should he be chosen by the council?

With John Snyder out of the city, the board found itself first standing 7 to 7 on this question, when it met at 7 o'clock and after seven motions of one sort or another, still stood 7 to 7. As the net result of this supposedly lucky number, the press was asked to extend an invitation to local attorneys to attend tonight's meeting and express their views.

Those of the freeholders who favor election by the people feel that the city attorney should be a check on the council and the city manager, and that only his election by the people will give him the necessary independence of action.**²²

The minutes of the 12 November 1930 Charter Commission meeting show that several attorneys showed up and offered their view that the City Attorney should be elected and not appointed in order to make the City Attorney independent from any appointing authority. After hearing from the attorneys, the Charter Commission voted 8 to 5 in favor of an elected City Attorney.²³

While the Charter was under submission to the voters during the 1931 election campaign, Charter Commission member Ray Mathewson provided a written explanation of the goal behind making the City Attorney an elected rather than appointed position:

The city attorney is elected by the people. At the present time he is appointed by the council. It was felt that if the attorney were elected by the people, he would be in a much more independent position than if he were appointed by the council. The council may employ special water counsel to aid the city attorney.²⁴

Mr. Mathewson had previously explained that the City Attorney, as an elected rather than an appointed official, would have "complete independence":

The duty of the city attorney is to give legal advice to every department and official of the city government on municipal matters. He also must act as the

²² 12 November 1930 News Article Lawyers Are Asked to Aid Freeholders, attached as Exhibit 15.

²³ 12 November 1930 Charter Commission Minutes, p. 2, attached as Exhibit 16.

²⁴ 1 April 1931 article "Council Must Elect Manager in Two Months" (Ray Mathewson), attached as Exhibit 17.

representative of the various departments before the courts. He should occupy an independent position so that his opinions would not be influenced by any appointive power. For this reason he should be elected by the people. If elected, the city attorney is in a position of complete independence and may exercise such check upon the actions of the legislative and executive branches of the local government as the law and his conscience dictates.²⁵

Again, the rationale for having the City Attorney elected by City voters was to ensure the City Attorney's independence. The objective of creating an independent City Attorney was set forth in a letter to the elected City of San Diego Charter Commission that decided to put the proposal to elect the City Attorney on the 7 April 1931 ballot.²⁶ The letter was authored by James G. Pfanstiel to 1930-1931 Charter Commission Chairman Nicholas J. Martin.²⁷ Pfanstiel previously served on the 1929 City of San Diego Charter Commission, which proposed a Charter that was voted down in 1930.²⁸ The letter from Pfanstiel to Martin explained the rationale behind electing the City Attorney:

ARTICLE FIVE, SECTION FIFTEEN. – Some advocated with considerable degree of force that the city attorney should be elected by the people. The argument is that the city attorney is the attorney for the entire city and each and every elective and appointive officer thereof upon all questions pertaining to the municipality, and he should occupy an independent position so that his opinions may be uninfluenced by any appointive power. It would seem that if the city

²⁵ Rough Draft of a Proposed "Strong Mayor" Council Form of Government p. 2, attached as Exhibit 18.

²⁶ See 12 September 1930 letter from James G. Pfanstiel to 1930-1931 Charter Commission member Nicholas J. Martin, attached as Exhibit 19.

²⁷ See news article "City Attorney To Be Elective Board Decides," attached as Exhibit 20.

²⁸ See 12 September 1930 letter from James G. Pfanstiel to 1930-1931 Charter Commission member Nicholas J. Martin, attached as Exhibit 19; News article "New Charter For S.D. Gets Endorsement, Member of 1929 Board of Freeholders Approves City Proposal," attached as Exhibit 21.

attorney is elected by the people he should have the power to appoint his deputies without civil service regulations, subject, of course, to budget control.²⁹

A brochure used to inform voters about the position of an elected San Diego City

Attorney distributed in connection with the April 1931 election explained that electing the City

Attorney would guarantee protection of the public interest:

INDEPENDENT CITY ATTORNEY

The city attorney is to be elected by the people. This is a guarantee that the legal head of the government will be able to fearlessly protect interests of all San Diego and not merely be an attorney appointed to carry out wishes of council or manager.³⁰

V.

**THE PENSION BOARD PRESIDENT HAS ADMITTED
THE CITY ATTORNEY IS THE PENSION BOARD LAWYER**

The SDCERS Board President admitted that the San Diego City Attorney is the attorney for the SDCERS Board on at least two occasions. On 9 April 1997 SDCERS Board President Keith Enerson admitted the San Diego City Attorney is the attorney for the SDCERS Board under the San Diego City Charter. In the recitals section of a 9 April 1997 agreement between the San Diego City Attorney and the SDCERS Board, paragraph “A” explicitly stated the City Attorney is the attorney for the SDCERS Board: “A. Pursuant to section 40 of the Charter for the City of San Diego (“Charter section 40”), the City Attorney is the attorney for the City and the Board.”³¹

²⁹ See 12 September 1930 letter from James G. Pfanstiel to 1930-1931 Charter Commission member Nicholas J. Martin, attached as Exhibit 19; A.R. Sauer news article describing the defeat of the 1929 Charter proposal, attached as Exhibit 22.

³⁰ Election brochure from 7 April 1931 election entitled “Facts About the Proposed City Charter,” attached as Exhibit 23.

³¹ 9 April 1997 Agreement for Retirement System Legal Services, attached as Exhibit 24.

On 25 August 1995 the President of the SDCERS Board again admitted that the City Attorney provided legal services to the SDCERS Board under the mandate of the San Diego City Charter. An agreement between the SDCERS Board and the San Diego City Attorney dated 25 August 1995, signed by SDCERS Board President Keith Enerson, provided in pertinent part:

1. The City Attorney provides legal services to the Board pursuant to the mandate of Section 40 of the San Diego City Charter.³²

California law³³ allows statements to be admitted as evidence if the “statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement.”³⁴ The San Diego Municipal Code requires and authorizes the SDCERS Board President to make statements on behalf of SDCERS.

Specifically, unless otherwise governed by state or federal law, the SDCERS Board President is empowered and required to “promptly inform the City Manager and the City Council of all material facts or significant developments relating to all matters under the jurisdiction of the [SDCERS] Board.”³⁵ Moreover, Rule 2.01 of the Rules of the Retirement Board of Administration gives the SDCERS Board President broad powers.³⁶ Thus, statements by SDCERS Board President Keith Enerson that the City Attorney is the attorney for the SDCERS

³² 25 August 1995 Memorandum of Understanding between the Office of the San Diego City Attorney and the SDCERS Board, attached as Exhibit 25.

³³ California Evidence Code §1222.

³⁴ California Evidence Code §1222, attached as Exhibit 26.

³⁵ Municipal Code §24.0911 (c), attached as Exhibit 27.

³⁶ Rules of the Retirement Board of Administration §2.01, attached as Exhibit 28.

Board are authorized and binding admissions by SDCERS that the City Attorney is in fact the attorney for the SDCERS Board.³⁷

VI.

THE SAN DIEGO CITY ATTORNEY HAS TERMINATED THE MEMORANDUM OF UNDERSTANDING WITH SDCERS

A 22 July 1998 Memorandum of Understanding (22 July 1998 MOU) allowed the SDCERS Board to retain its own Legal Services Department to “fulfill its fiduciary and administrative responsibilities to the System.”³⁸ On 2 November 2004 the people of San Diego elected a new City Attorney, who was sworn in on 6 December 2004.³⁹ On 15 December 2004 the new San Diego City Attorney terminated the 22 July 1998 MOU by letter.⁴⁰

The 15 December 2004 letter from the City Attorney to the SDCERS Board

Administrator provided:

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

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 right to do so under California Constitution Article XVI,

³⁷ California Evidence Code §1222, attached as Exhibit 26.

³⁸ 22 July 1998 Memorandum of Understanding between the San Diego City Attorney and the SDCERS board, attached as Exhibit 5.

³⁹ 6 December 2004 Certificate of Election of Michael J. Aguirre, attached as Exhibit 10.

⁴⁰ 15 December 2004 letter from San Diego City Attorney to SDCERS Board Administration, attached as Exhibit 6.

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 18, 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.

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 immediately⁴¹

The 15 December 2004 letter provided three grounds on which the City Attorney relied to assert his authority to act as legal counsel to the SDCERS Board. The City Attorney stated: (1) the former City Attorney had no authority to bind him, (2) the term of the 22 July 1998 MOU was confined to the term of the prior City Attorney's term in office and (3) Article 16, §17 of the California State Constitution did not extinguish the authority of the San Diego City Attorney to act as legal counsel to the SDCERS Board.⁴²

The Memorandum of Understanding (MOU) at issue is an agreement governed by general contract principles. See *Chula Vista Police Officers' Assn. v. Cole*, 107 Cal. App. 3d 242, 246 (1980) [interpretation of MOU under the Meyers-Millias-Brown Act governed by the

⁴¹ 15 December 2004 letter from San Diego City Attorney to SDCERS Board Administration, attached as Exhibit 6.

⁴² *Id.*

same rules applicable to private contracts]. Absent state law to the contrary, all contracts, whether public or private, are to be interpreted by the same rules. Cal. Civ. Code §1635.

Generally, if a contract, such as an MOU, fails to include an express provision for its duration, and one cannot infer the intent of the parties as to duration from the nature of the contract and the circumstances surrounding it, the term is held to be at least a reasonable time, with obligations under the contract terminable at will by any party on reasonable notice after such reasonable time has elapsed. *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union*, 69 Cal. 2d 713, 727-728 (1968). In *Consolidated Theatres, Inc., v. Theatrical Stage Employees Union*, 69 Cal. 2d 713, 727-728 (1968), a case involving theatrical labor unions, the contract at issue similarly lacked an express or implied term of duration. If neither an express nor an implied term can be found, the court will generally construe the contract as terminable at will. *Id.* at 727.

The MOU at issue does not include an express provision for its duration. The MOU was in effect approximately six-and-one-half years (from July 22, 1998 to December 15, 2004) before the new City Attorney sent a letter terminating the agreement. The MOU was in effect through the remainder of the term in office of the prior City Attorney who signed the agreement. This clearly was a “reasonable time” under which legal services were provided to the Board by outside counsel.

Moreover, Section D of the MOU at issue confirms that this agreement was not intended to remain in effect indefinitely. In Section D, the prior City Attorney expressly contested the Board’s legal arguments and, thus, the legal basis of the agreement. The agreement expressly stated that the City Attorney did not waive his position regarding his rights and responsibilities to

the Retirement System under the City Charter. This provision confirms the City Attorney could take action to terminate the MOU at a later date, upon reasonable notice.

VII.

APPOINTED SDCERS ATTORNEYS HAVE NOT BEEN INDEPENDENT FROM THE SDCERS BOARD

Since approximately 25 August 1995, the SDCERS attorney has not been independent from the SDCERS Board. On that date the San Diego City Attorney entered into a legal services agreement with the SDCERS Board. The agreement provided that Deputy City Attorney Loraine E. Chapin would be “housed exclusively and entirely at the Retirement Office.”⁴³ Chapin drafted the agreement.⁴⁴ Since that time, SDCERS has received legal advice from in-house legal staff who work closely with certain members of the SDCERS Board. The attorney for the SDCERS Board has now been indicted by a federal grand jury for conspiracy to commit wire and mail fraud, mail fraud and wire fraud.⁴⁵

While the SDCERS Board operated without independent counsel, the retirement system made decisions supported by General Counsel Chapin that resulted in the pension system’s substantial financial decline.⁴⁶ There is a serious issue as to whether the SDCERS General

⁴³ 25 August 1995 legal services Memorandum of Understanding between the San Diego City Attorney and the SDCERS Board, attached as Exhibit 25.

⁴⁴ 25 August 1995 legal services Memorandum of Understanding between the San Diego City Attorney and the SDCERS Board (see LEC initials p. 3), attached as Exhibit 25.

⁴⁵ Indictment in *United States of America v. Ronald Saathoff et. al.*, dated 6 January 2006 (Criminal Case No. 06CR0048 BEN), attached as Exhibit 29.

⁴⁶ See 2004 SDCERS Actuarial Report finding that the SDCERS funding deficit exceeds \$1.4 billion, attached as Exhibit 30; see San Diego City Attorney’s Interim Reports 1, 2, 3, 6 and 7.

Counsel violated the conflict of interest provisions of California law, which could render the 22 July 1998 MOU null and void.

Chapin wrote four legal opinions addressing whether the City Attorney was to be counsel for the SDCERS Board and detailing how she came to be SDCERS General Counsel.⁴⁷ As Deputy City Attorney, Chapin worked to create a General Counsel position at SDCERS and to secure her appointment to that position. The lack of independence of the SDCERS counsel led to a chain of events that spiraled SDCERS into its present crisis. These events illustrate the wisdom of the drafters of the City's 1931 Charter, who wanted the independent City Attorney to serve as the SDCERS attorney.

In a 22-page legal memorandum entitled "Legal Services for the Retirement Board," dated 25 April 1996, Chapin recounts a meeting she held with former City Attorney John Witt, City Attorney Casey Gwinn, and attorneys John Kaheny and Stu Swett. At the meeting, Chapin "recommended that the City Attorney permit the Retirement Board to secure the services of legal counsel of its choice to assist it with its charter-mandated investment and administrative duties."⁴⁸ Chapin wrote that Charter §40 permitted the SDCERS Board "to secure the legal counsel of its choice to assist it with its charter-mandated investment and administrative responsibilities." She also found that "Ethical, political, practical and financial considerations

⁴⁷ 25 April 1996 Memorandum from Lori Chapin to Les Girard, Chief Deputy, entitled "Legal Services for the Retirement Board, attached as Exhibit 31; 6 May 1998 Memorandum form Lori Chapin, SDCERS General Counsel to The Business and Procedures Committee, via Lawrence B. Grissom, Retirement Administrator, attached as Exhibits 32, 35, 36.

⁴⁸ *Id.* at 1.

favor a recommendation by the City Attorney to permit the Retirement Board to secure the legal counsel of its choice . . .”⁴⁹

On 20 December 1996, the SDCERS Board approved the establishment of the position of General Counsel to provide legal services for the Board.⁵⁰ On 16 January 1997, the SDCERS Board President recommended that the SDCERS Board “direct Staff to move forward with the steps necessary to convert by July 1, 1997, current Deputy City Attorney Chapin, to Board personnel, in the position of General Counsel.”⁵¹

On 17 January 1997 SDCERS Board member Ron Saathoff recommended that Chapin be hired as SDCERS General Counsel:

2. Process Regarding Legal Services to the Retirement Board

Mr. Saathoff stated Staff’s recommendations regarding this issue has been distributed. He summarized by saying Staff is recommending that the Board retain Lori Chapin as in-house legal counsel to this Board.⁵²

The SDCERS Board unanimously approved Chapin’s hiring as General Counsel of the SDCERS Board. On 22 January 1997, Chapin wrote a memo to Casey Gwinn confirming the SDCERS Board’s decision to hire her as SDCERS Board’s General Counsel and her decision to take the new position:

Last Friday, January 17, 1997, the Retirement Board unanimously approved a recommendation made by Keith Enerson, the Board’s President to direct Retirement Staff to move forward with the steps necessary to convert by July 1, 1997, my position as a deputy city attorney advising the Board to the position of

⁴⁹ *Id.* at 2; attached as Exhibit 31.

⁵⁰ 16 January 1997 Memorandum from SDCERS Board President Keith Enerson to the SDCERS Business and Procedures Committee, attached as Exhibit 33.

⁵¹ *Id.*

⁵² 17 January 1997 SDCERS Board Minutes (p. 7), attached as Exhibit 34.

General Counsel to the Board, a position yet to be created. This action was in response to your oral and written requests to the Board President in June and November, 1996, respectively to fashion a new relationship for the provision of legal services which would meet the Board's concerns and your responsibilities as the City Attorney providing legal advice to the City Council, Retirement Board and ultimately the taxpayer.⁵³

In her 22 January 1997 memorandum, Chapin admitted she was "the deputy city attorney advising the Retirement Board for the past six years..."⁵⁴ Chapin admitted in her 22 January 1997 memorandum that she was instrumental in creating the General Counsel position, a position she would advance to under the new legal services plan:

As the result of my personal experience, I prepared confidential memoranda to you and Les Girard in April through June, 1996, regarding the City Attorney's legal responsibilities under Charter §40. I shared with you the need to educate the Council and bring to its attention the need to evaluate, review and consider changes to the plan document resulting from changes in federal, state and local law.⁵⁵

Finally, Chapin provided background showing how she positioned herself to take the new General Counsel position with SDCERS:

In June 1996, you, John Witt, John Kaheny and I met with Keith Enerson and Larry Grissom regarding legal services for the Retirement Board. Keith informed the group of the Board's desire to retain legal counsel of its choice to assist it with its Charter-mandated investment and administrative responsibilities. You asked the Board to evaluate its needs and submit a request for legal services. As the future City Attorney for the City Council, Retirement Board and ultimately the taxpayer, you indicated your willingness to work with the Retirement Board to fashion a new relationship for the provision of legal services which met both the Board's concerns and your responsibilities to the Board, City Council and taxpayer.⁵⁶

⁵³ 22 January 1997 memorandum from Lori Chapin to Casey Gwinn entitled "Legal Services to the Retirement Board," attached as Exhibit 35.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

Chapin then explained her transition from Deputy City Attorney to SDCERS General

Counsel:

- I would remain a deputy city attorney until July 1, 1997. I would remain located in the Retirement Office. I would continue to provide legal services to the Board. The same would be true with Roxanne Parks and Merlita Hilario. (They are tied into the reimbursement process as well. They are an integral part of by (my) ability to provide the level of service the Board has grown accustomed to expect and demand.)
- You would continue to be reimbursed for my services, as well as those of Roxanne Parks and Merlita Hilario until July, 1997.⁵⁷

Chapin closed her 22 January 1997 memorandum by discussing the opportunities the new arrangement provided for her and others:

In closing, I did not fully realize the enormity of the pressure and strain I had been laboring under until the Board action on Friday. For the first time I was reminded of the possibilities and incredible opportunities for you, me, the Office, and the Council and the City available with a reconsideration of the way legal services are provided to the Board. A weekend in Big Bear with my family provided the perfect opportunity for these ideas to resurface and take form. The creative juices began to flow. So many ideas surfaced I had to grab a pen and pencil and write them down before they got lost in the crowd.⁵⁸

On 11 March 1997 Chapin wrote the City Attorney to request that he sign off on the creation of her new position as SDCERS' General Counsel:

Under your direction, an Agreement For Retirement System Legal Services ("Agreement") has been drafted and signed by the President of the Retirement Board. It awaits your signature. This agreement authorizes the creation of a separate Legal Services Division for the Retirement Board consisting of three positions, General Counsel, Assistant General Counsel and Administrative Legal Secretary. It is contemplated the positions will be included in the FY 98 Annual Appropriations Ordinance, effective July 1, 1997. To accomplish this in the most efficient and timely manner, I need your help.

⁵⁷ *Id.* at 6.

⁵⁸ *Id.* at 8.

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Finally, I wanted to let you know I have scheduled a meeting with Stu Swett for Wednesday, March 12, to discuss the procedures for creating the new positions. I asked for this meeting because I was informed he is usually involved in these matters. Please let me know if this proposed course of action meets with your approval. Thank you for your assistance.⁵⁹

Chapin's involvement in influencing the creation of the General Counsel's position at SDCERS and in influencing her appointment to the position as its general counsel raise the issue of whether she violated Government Code §1090. Under Government Code §1090 public officials are prohibited from "being financially interested in any contract made by them in their official capacity."⁶⁰ If Chapin made a contract in her official capacity in which she had a financial interest and thereby violated §1090, the underlying contract is void.⁶¹

In *People v. Sobel* the court outlined the broad reach of Government Code §1090:

The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.⁶²

Government Code §1090 is aimed at eliminating temptation, avoiding the appearance of impropriety, and assuring the government of the officer's undivided and uncompromised allegiance.⁶³ Its constraints appear to be designed to prohibit self-

⁵⁹ 11 March 1997 memorandum to Casey Gwinn relating to the Status of Legal Services for the Retirement Board, attached as Exhibit 36.

⁶⁰ Government Code §1090, attached as Exhibit 37.

⁶¹ See, *People v. Sobel*, 40 Cal.App.3d 1046 (1974), attached as Exhibit 38.

⁶² *Id.* at 1052.

⁶³ See *Finnegan v. Schrader*, 91 Cal. App. 4th 572, 580 (2001) [employment agreement set aside because employee involved in contract]; see, *Campagan v. City of Sanger*, 42

serving actions such as those of Chapin, who used her position as a Deputy City Attorney to gain the position of General Counsel for the SDCERS Board.⁶⁴

The federal indictment charges that Chapin, as SDCERS General Counsel, was head of the SDCERS Legal Services Division and “had the duty to provide legal advice and assistance to the SDCERS Board.”⁶⁵ Further the federal indictment alleges Chapin had a duty to keep the SDCERS Board fully informed of material facts:

As the General Counsel of SDCERS, defendant Chapin had a duty to keep the SDCERS Board fully informed of all material information, including information about (a) proposals that could affect the funding of SDCERS, (b) SDCRS Board decisions that could impact the financial interest of an SDCERS Board Trustee, (c) whether SDCERS Board Trustees and staff were complying with state and federal laws, and (d) whether an SDCERS Board Trustee had a conflict of interest.⁶⁶

The federal indictment describes a 2002 scheme in which the SDCERS Board allowed the City of San Diego to pay less into SDCERS than was necessary to ensure full funding of pension benefits.⁶⁷ The indictment also alleges Chapin concealed from members of the SDCERS Board the fact that a proposal coming before the SDCERS Board would allow Ron Saathoff, a board member, to receive a \$25,000 per year increase in his pension benefit.⁶⁸

Cal. App. 4th 533 (1996) [Set aside attorney contingency employment agreement of City Attorney who was involved in contract’s formation].

⁶⁴ Chapin’s actions may also have violated the conflict of interest provisions of the Political Reform Act, Government Code §81000, *et seq.* The City Attorney’s office is reviewing whether to initiate a civil enforcement action.

⁶⁵ Indictment U.S. v. Saathoff (p. 4), attached as Exhibit 29.

⁶⁶ *Id.* at 5.

⁶⁷ *Id.*

⁶⁸ *Id.* at 6.

The federal indictment charges that Chapin stood to gain from another provision in the same proposal: “If enacted, these increased benefits would have raised the retirement benefits for defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN.”⁶⁹ The indictment also alleges Chapin acted in order to maintain her position with SDCERS.⁷⁰

The decision to allow the SDCERS Board to appoint its attorney has led to a series of abuses. The voters in 1931 sought to avoid by making the attorney for the pension and for all other city departments answerable to the voters and independent from any the appointing authority. Thus, there is not only a strict legal requirement that the City Attorney be allowed to assert his authority as legal counsel to the SDCERS Board, but practical considerations urge the same result.

VII.

THE CALIFORNIA STATE CONSTITUTION DOES NOT LIMIT THE CITY ATTORNEY’S AUTHORITY TO ACT AS THE PENSION BOARD ATTORNEY

SDCERS has argued that Article 16, §17 of the California Constitution divests the City Attorney of his Charter-mandated responsibility to serve as its chief legal counsel. Article 16, §17 was enacted to protect public pension funds from abuse, political meddling, and corruption.

Looking back over the past nine years, since SDCERS retained its own counsel, it is absolutely apparent that allowing SDCERS to avoid the counsel of the City Attorney has served the ends of abuse and corruption. Rather, the SDCERS administration – including its in-house counsel – engaged in a breach of its fiduciary duties. The result is a well-publicized unfunded pension liability approaching two billion dollars to SDCERS and a historically low funding level,

⁶⁹ *Id.*

⁷⁰ *Id.* at 12.

jeopardizing the security of pension beneficiaries for generations to come. SDCERS has used its asserted “independence” not to shield the fund from abuse and corruption, but to shield its own abuses and corruption from public scrutiny. This fact is underscored by the indictment of six former SDCERS Board members for felony self-dealing.

The people’s Charter-based right to appoint their independently elected City Attorney as chief legal counsel for the city employees’ retirement system complies with all relevant laws, including Article 16, §17 of the California Constitution. In fact, having the City Attorney act as general counsel for SDCERS furthers the expressed public interest in enacting that Constitutional section – the protection of public pension funds from abuse and corruption. It does not interfere with the SDCERS Board’s plenary authority over management of assets and distribution of benefits, because the City Attorney has no role in making management decisions. It does not subject the system to any danger that retirement funds will be misused by the City.

Contrary to the suggestion of SDCERS, the San Diego City Attorney is not simply another arm of City bureaucracy. The City Attorney is an independently elected official, vested with responsibility to provide counsel to all City departments. The City Attorney stands as another check against potential corruption and wrongdoing between City officials and others who might misuse their office to the detriment to the City, the retirement system, and/or plan participants.

The right of the people of San Diego to govern their own municipal affairs is protected by Article 11, §5 of the California Constitution, which includes regulation of the City Employees’

Retirement System. Regulation of a public pension system consistently has been held to be a municipal affair.⁷¹

“Proposition 162,” which California voters passed in 1992 and which is codified as California Constitution Article 16, §17, does not conflict with San Diego City Charter provisions vesting the City Attorney with the authority to represent the pension system. Although that section provides that the pension board shall have “plenary authority and fiduciary responsibility for investment of moneys and administration of the pension system,” it has been made clear by the courts and the language of that section that authority of the pension system is limited to administration and investment of its assets, provision of benefits, and provision of actuarial services.⁷² As stated by the Third District Court of Appeal in *Westly v. California Public Employees’ Retirement System Board of Administration, et al.*, 105 Cal.App.4th 1095, 1113:

We have concluded that the powers the voters intended to give the Board (in enacting Proposition 162) do **not** include the exclusive and unfettered authority over payments made to and on behalf of its members and employees. Rather, the extent of the Board’s authority *is limited to the specific areas enumerated in the Section*. *Westly* at 1113, emphasis added.

The specific areas are, again, administration of investments, provision of benefits, and provision of actuarial services.

By contrast, Section 17 does not give power to a retirement board to select governing personnel. In fact, power is expressly reserved to the people to make key personnel decisions,

⁷¹ *Grimm v. City of San Diego*, (1979) 94 Cal.App.3d 33, 37 [the right of the people is so closely guarded that only if another Constitutional provision directly and expressly conflicts will a City Charter be overruled]. As stated by our own California Supreme Court in *City of Grass Valley v. Wilkinshaw*, 34 Cal.2d 595 (1949), “(i)f there is any question of the application of the Constitution, the Constitution must be strictly interpreted in favor of municipal power and against the existence of any limitation not expressly stated. *City of Grass Valley v. Wilkinshaw*, 34 Cal.2d 595, 599 (1934). These cases are attached as Exhibits 39 and 40.

⁷² *Westly v. California Public Employees’ Retirement System Board of Administration, et al.*, 105 Cal.App.4th 1095, 1113. Attached as Exhibit 41.

including determination of the board itself. Subsection (f) provides that the composition of a retirement board cannot be changed, amended or modified unless the change, amendment or modification *is ratified by a majority vote of the electors in the jurisdiction in which the participants of the retirement system are or were, prior to retirement, employed.*

The argument that California Constitution Article 16 §17 provides exclusive authority to a pension board to make key staffing decisions, such as employment of counsel, was considered and rejected in *Westly, supra*. *Westly* involved an attempt by the state pension board to avoid state-imposed limitations on the compensation of its members and employees. Similar to the argument made by SDCERS, the state retirement board argued that regulation of its expenditures would make it impossible for the Board to comply with its fiduciary duties under Section 17. The court rejected this argument, finding: 1) the right to determine the compensation of state employees was specifically granted by the Legislature to the State Controller; and 2) the “plenary authority” granted the board under Section 17 did not immunize the Board from regulation that did not conflict with its provisions.

Significantly, in reaching its decision, the *Westly* court noted that the State Controller, just like the San Diego City Attorney, was entrusted by the people with certain responsibilities that affected the administration of the system. The court rejected the Retirement Board’s attempt to determine its own rules: “An attempt by an administrative agency to exercise control over matters which the legislature has not seen fit to delegate to it *is not authorized by law and in such cases the agency’s actions can have no force or effect.*”⁷³

Similarly, in *Singh v. Board of Retirement of the Imperial County Employees’ Retirement System*, after analyzing the voter intent behind Proposition 162, the Fourth District Court of

⁷³ *Westly* at 1106 (emphasis added). Attached as Exhibit 41.

Appeal rejected a retirement board’s claim that the term “plenary authority” insulated the retirement board’s administrative decisions from review by the Superior Courts.⁷⁴ In limiting the meaning of “plenary authority,” the court recognized that the voter intent behind the Proposition was to “(a) remov[e] the Legislature’s authority to make investment decisions, and (b) established that a system’s primary obligation was to its members and beneficiaries.”⁷⁵

In sum, nothing in California Constitution Article 16, §17 has ever been interpreted by courts to insulate SDCERS from governance by the people. Rather, courts have consistently held that public retirement boards remain subject to control by the people and the courts.

VIII.

CONCLUSION

Voters of the City of San Diego made the office of City Attorney independent of any constituencies of the City to whom the City Attorney renders legal advice and counsel. A former Deputy City Attorney used her position to influence government decisions that created a general counsel position for herself as counsel for the SDCERS Board. Under this arrangement the City Attorney did not act as an independent attorney for the SDCERS Board.

Upon his elevation to the position of San Diego City Attorney, a new City Attorney terminated the agreement allowing the SDCERS Board to be advised by an attorney of its choice. Instead, the City Attorney invoked his authority to act as legal counsel to the SDCERS Board. The voters of the City of San Diego made a political decision in 1931 to ensure the City Attorney would advise all City departments, including the retirement system, so that counsel for those entities would remain independent from any appointing authority.

⁷⁴ *Singh v. Board of Retirement of the Imperial County Employees’ Retirement System*, 41 Cal.App.4th 1180, 1185 (1996). Attached as Exhibit 42.

⁷⁵ *Id.* at 1191.

Based on this history, the City Attorney has the authority to reassert his right to act as the independent legal counsel for the SDCERS Board.

By _____
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