

The following is a TENTATIVE ruling for 6/23/2006,
Department 69, the Honorable Jeffrey B. Barton presiding.

Case Number GIC841845

TENTATIVE RULING

Re: San Diego City Employees Retirement System v. San Diego City Attorney

Michael J. Aguirre, et al., and related cross complaints

Case #: GIC 841845

Hearing date: June 26, 2006 at 9:00 am.

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SDCERS' MOTION TO DISMISS:

Plaintiff San Diego City Employees' Retirement System's ("SDCERS" or "board") brings a non-statutory motion to dismiss the fifth amended cross-complaint ("FACC") filed by defendants/cross-complainant City of San Diego ("City").

SDCERS, as the moving party, has the burden of proof on this motion to dismiss. The evidence before the court is in conflict regarding what the San Diego City Council ("City Council") approved. Under such a circumstance, the Court looks to all the evidence. Exhibit 11 to SDCERS' notice of lodgment ("SDCERS NOL") consists of a transcript of Deputy City Attorney Les Girard publicly announcing the results of the closed session meeting of the City Council regarding the authority of the City Attorney to prosecute the cross-complaint. He states "Last week in closed session by a unanimous vote, the City Council authorized the City Attorney to pursue a modified cross-complaint in the action SDCERS versus the City of San Diego and City Attorney Mike Aguirre." This announcement complies with the procedure set forth in Government Code section 54957.1.

The SDCERS NOL contains numerous records of closed session meetings of the City Council to consider various aspects of this litigation. (See, for example, SDCERS NOL Exhibits 3, 4, 6, 8, 9, and 10). Exhibits 8, 9 and 10 specifically reflect briefing on the cross-complaint. Additionally, the exhibits appear to reflect the City Council approved payment to the law firm of Heller Ehrman, LLP to assist the City Attorney in the prosecution of the cross-complaint. (SDCERS NOL Exhibits 14 and 39.) As pointed out in the opposition, the City Council has taken no public action to indicate there was no authority given the City Attorney to prosecute this cross complaint, which has been discussed in numerous closed sessions for almost a year.

San Diego Mayor Jerry Sanders in his declaration states, "Accordingly, I make this declaration to inform the Court, as the City's highest elected official, its chief executive officer, and as head of City government, that the City needs and desires from this Court a determination as to the legality of the benefit increases under MP I, MP II, LORP and EORP at the June 23, 2006 hearing on the City's Motion for Summary Judgment....As the leader of the City, and on behalf of the people of the City, I therefore respectfully ask this Court to entertain the City's motion and resolve the issues raised therein."

The court is concerned that there is a lack City Council authority based on the declaration of Council President Scott Peters. There is a clear desire the matter proceed on the part of the Mayor Sanders. In essence this motion consists of a party trying to remove its' opponents attorney. This has significant repercussions as such a ruling would deny the City its lawyer on an action which has been pending a long time. Under these unusual and ambiguous circumstances, the court finds that SDCERS has failed to carry its burden of proof to dismiss. The evidence submitted shows Government Code section 54957.1 was complied with, and the motion is therefore denied.

The Court rules on the various objections to evidence by the parties as follows:

The City's objection to consideration of any evidence outside the pleadings or subject to judicial notice is overruled. The court in *Baker v. Boxx*, (1991) 226 Cal.App.3d 1303 found a non- statutory motion to dismiss was a correct vehicle to challenge an attorney's authority and implied that the trial court could make the necessary evidentiary findings.

The City's objections to the Peters' Declaration are overruled.

Judicial notice is granted as requested and objections are overruled.

CROSS-DEFENDANT TORRES' DEMURRER AND MOTION TO STRIKE, AND JOINDERS THERETO:

The court did not consider the demurrer and motion to strike filed by cross-defendant John A. Torres, and joined by cross-defendants Ron Saathoff, Mary Vattimo, Cathy Lexin, Teri Webster and Sharon Wilkinson, since Torres and all the individually named cross-defendants have been dismissed from the action. The demurrer and motion are off calendar.

The court denies the request for joinder in cross-defendant Torres' motion to strike filed by plaintiff/cross-Defendant SDCERS, as Torres has been dismissed from the action and SDCERS filed no substantive papers in support of the motion to strike.

CITY'S MOTION FOR SUMMARY JUDGMENT / ADJUDICATION AND SDCERS' DEMURRER TO FIFTH AMENDED CROSS-COMPLAINT:

The court will hear argument on SDCERS' demurrer to City's fifth amended cross-complaint.

The City has brought a motion for summary judgment in its favor as to its fourth amended cross complaint ("FACC"). A court order on a motion for summary judgment or adjudication that is based on a superseded pleading is void. (*Perry v. Atkinson* (1987) 195 Cal.App.3d 14, 18). Thus, to the extent the City's motion is based on its Fourth Amended Cross-Complaint, which has been superseded by the operative Fifth Amended Cross-Complaint, the court is without power to consider the motion on the merits. The City cited no contrary authority and appeared to concede the issue in the Reply. Thus, the City's motion based on its fourth amended cross-complaint is denied.

From commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Additionally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Ibid.*) The movant meets its burden by presenting evidence in the form of " 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' " (*Id.* at p. 855; Code Civ. Proc., § 437c, subd. (b).) If the movant meets its burden of production, the movant "causes a shift, and the opposing party is then subjected to a burden of production of [its] own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co., supra*, at 850.)

In the alternative, the City brought a motion for summary adjudication of the first cause of action of SDCERS' complaint as to the Legislative Officers Retirement Plan ("LORP") and Executive Officers Retirement Plan's ("EORP") benefits only, on grounds that they violate Government Code section 1090, California Constitution, Article XVI, section 18, and San Diego City Charter section 99. A summary adjudication must completely dispose of a cause of action, defense,

damage claim, or duty issue. (Code Civ. Proc. § 437c(f)(1).) Here, a ruling on whether the LORP and EORP benefits violate §1090, Art. XVI §18, and/or §99 does not dispose of SDCERS' entire declaratory relief cause of action. As such, the City's motion for summary adjudication is denied.

The City also seeks summary adjudication as to complainants-in-intervention AFSCME Local 127 ("Local 127), Municipal Employee's Association ("MEA"), and San Diego Firefighters, Local 145's ("Local 145") complaints (collectively "intervenors' complaints") and the *Abdelnour* plaintiffs' complaint on the grounds that all of the retirement benefits at issue are illegal and void under section 1090, Cal. Const. Art. XVI, §18, and Charter § 99, or in the alternative adjudicating the legality of the LORP and EORP. For the same reasons as set forth above, the City is unable to dispose of the entire cause of action in *Abdelnour*. The court is unable to determine from Local 127's complaint what benefits it is referring to in "paragraph 22 of the Complaint" as there is no paragraph 22 referenced. Local 145's complaint incorporates the relief requested in the SDCERS' complaint, so the same defects are presented.

The Court can address the City's MSA to MEA's complaint-in-intervention on the merits since MEA limited its requested declaratory relief to the 1996 ("MP I") and 2002 ("MP II") memorandum of understandings and related ordinances. This puts most all of the significant issues before the Court for this motion.

SDCERS' and the Intervenors' object to the evidence presented in the City's notice of lodgment II and III, and the late-filed Declarations of Daniel Bamberg, Daniel Bamberg II, Kevin Christensen, Ada Nunez, and supplemental declaration of Don McGrath. They argue presentation of such new evidence violates the opposing parties' right to due process. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316). All the evidence contained in the City's notice of lodgment II and III was filed after SDCERS and the Intervenors had an opportunity to respond to the City's motion for summary judgment. However, much of the evidence consists of transcripts of public meetings or other matters that appears well known to all. The court will hear argument about how the consideration of such evidence causes prejudice or disadvantage to objecting parties.

The court is also concerned regarding the intention to play videotapes of testimony or other events already before the Court in transcript form. This appears cumulative and unduly time consuming especially in light of the primary legal issues the court is interested in seeing addressed as discussed below.

The court requests the parties to focus on the following issues:

A. Substantive Issues:

The City contends in its motion that members of the SDCERS Board, San Diego City Council members, and other City officials entered into a series of agreements between 1996 and 2002 regarding pension benefits. The City and SCDERS agreed to a funding scheme that permitted the City to pay rates of funding for the system that were less than the legally required actuarially-determined rates. (City's MF No. 13). The City contends that certain members of the SDCERS Board were financially interested in these contracts, under which they agreed to allow the City to under fund its contributions to the retirement system in exchange for increases in their personal pension benefits. The City argues these agreements were made in violation of Government Code section 1090, which prohibits a city official from making any contract in which he or she has a financial interest. The City also argues these agreements violated San Diego City Charter section 99 and California Constitution Article XVI, section 18, which require each year's income and revenue to pay each year's indebtedness and liability.

Assuming for purposes of argument that the actions of the SDCERS Board, in agreeing to under fund the pension via MPI and MPPII, did violate Government Code section 1090, the parties should be prepared to address how voiding these funding agreements would invalidate the City's legislation through which the contested pension benefits were enacted. MPI and II were contribution reduction

agreements executed between SDCERS and the City. (SDCERS NOL at Ex. D, p. 6, ll. 2-7, p. 7, ll. 5-8; Ex. G, p. 9, ll. 6-9). SDCERS' Board did not consider or vote on the City-Union agreements. (City NOL at Ex. 6, pp. 13-32, Ex. 7, p.2). Since SDCERS was not a party to the collective bargaining agreements entered into between the City and its employees, a question arises as to how a decision about SDCERS' alleged illegal actions would vitiate an agreement to which it was not a party. No one has asserted this is an issue of law the court may decide. Is there at the least a triable issue of material fact as to whether there was one agreement between all the parties, or one agreement between the City and its employees subject to a contingency to be satisfied by SDCERS?

The City contends the municipal legislation can be invalidated by this court because it was enacted "in conjunction with" or "as part of the deal" through which MPI and MP II were executed by the City and SDCERS. Pursuant to *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 911-912, however, even if illegal conduct caused a legislative enactment by a public body, the enactment would not be invalidated. "[A]ny judicial attempt to determine the validity of legislation upon the basis of the motives of, or influences upon, particular legislators must inevitably prove a hazardous and largely futile task." (*Id.* at 914). If it is the City's position that the City Council's adoption of the collective bargaining agreement was contingent upon SDCERS' approval of MPI and MP II, it is unclear how the court could consider the City Council's intent in passing the legislation, given the holding in *Cooper*. In addition, how does this analysis hold up given that with MP II the City Council passed the resolution without contingency one month before approval by SDCERS of the under funding?

The court is also concerned the City is asking the court for an advisory opinion regarding the legality of benefits it granted its employees, if all the affected employees are not currently represented in this action. The statutory requirement that there must be an actual controversy between the parties before declaratory relief may be given precludes declaratory judgments that are merely advisory. (Cal. Civ. Pro. § 1060). Thus, declaratory proceedings are subject to the general rule for all California judicial proceedings that the rendering of an advisory opinion falls within neither the function nor the jurisdiction of the courts. (*People ex rel. Lynch v. Sup. Ct.*, (1970) 1 Cal.3d 910, 912). It is unclear from the facts

presented whether the Intervenor represents all of the potential employees affected by this lawsuit.

An opinion is advisory when the parties who would challenge the declaratory relief are not parties to the action. (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 860 [State Board of Education not entitled to declaratory relief confirming its power to promulgate certain regulations because local school districts, which were the entities most likely to challenge such rules, were not parties to the lawsuit]).

The parties should be prepared to address the following:

1. Are all present and past employees who may be affected by the voiding of benefits before the Court?
2. Does the City have non union employees affected by the remedy sought by the City who are not otherwise parties?
3. Are all retired employees members of the unions?
4. How can the Court address the legislative and executive benefits if none of the recipients are parties?
5. Is there some authority that would allow the Court to proceed under these circumstances?

Assuming for the purposes of the demurrer that the SDCERS action in agreeing to allow the City to under fund the pension violated 1090 and/or the debt limit laws: Does that not mean that action by SDCERS is void? Thus, the under funding agreement is void and the City would then owe the full contribution. Hasn't this issue been resolved by the *Gleason* and *McGuigan* settlements?

The City makes the argument that SDCERS is forcing it to pay too much into the pension system because of the "illegal benefits." However, isn't this situation a circumstance where the City has set the benefit levels and it is SDCERS' obligation to comply with the benefits the City set? In other words, doesn't this dispute always return by definition into an action by the City against its own

employees to undo a collective bargaining agreement enacted by the City Council ten years ago?

In addition, even if the court could invalidate the legislation, the City should be prepared to discuss the authority for its contention that the court can invalidate only the portions of the agreements that involved the pension benefits. In legislation in 1996 and 2002, the City Council adopted the MOU's with City employee Unions containing negotiated changes in wages, hours, and other terms, of which changes to retirement benefits were only a part. (Intervenor's UMF Nos. 122-124, 132, 137). It is unclear how the court could set aside the pension portion of the agreements without jeopardizing the entirety of the collective bargaining agreements.

For example, the City forcefully argues in the Reply to the MSJ/MSA that an illegal contract is void in its entirety. (See, Reply pg. 39 ln. 22 through pg. 40 ln. 19.) If the City is seeking to set aside the pension portion of the agreements with its employees, can they do so without setting aside the entirety of the collective bargaining agreements covering more than 10 years and involving thousands of current and past employees?

In *Sonoma County Organization of Public Employees et. al. v. County of Sonoma*, (1979) 23 Cal. 3d 296, the California Supreme Court recognized the give and take nature of collective bargaining agreements with public employees. The MOUs at issue involve not only the complained of pension benefits, but also salaries and a complexity of other employee benefits bargained for and approved by the City Council. (See, IUF 122-124, 132 and 137). Under this analysis, the employees gave up other benefits in return for the increased pension benefits. This raises several concerns, including the City's contention there was no consideration.

If these entire agreements are void as argued by the City, doesn't granting the relief requested expose the City to an immediate liability from all its employees whose salary and benefit agreements are now being set aside? What case stands for the proposition that in a bargained for exchange with a void illegal contract, the City can choose to enforce all the terms of the contract except the

ones they complain of? Do the employees have no remedy under such a circumstance? Why and based on what authority?

The parties have discussed the concept that pension rights vest upon employment. The employer has the right to make reasonable changes to the system. However, in cases such as *IAF Local 145 v. City of San Diego*, (1983) 34 Cal. 3d 292, 301-302, the California Supreme Court found that changes to a pension plan which disadvantage particular employees must be accompanied by comparable new advantages. How can the court eliminate vested pension rights as requested when there are no offsetting advantages as required under these cases? (See also, *Betts v. Board of Administration of the Public Employees Retirement System*, (1978) 21 Cal. 3d 859). What authority stands for the proposition that the Court can eliminate vested pension rights in this situation?

SDCERS and Intervenors' argument that SDCERS has not violated the debt limit laws, as set forth in California Constitution Article XVI, section 18 and City Charter section 99 have merit. Charter section 99 prohibits the city from incurring indebtedness in any year that exceeds income or revenue. Since Charter section 99 does not apply to SDCERS, SDCERS' adoption of MPI and MPI cannot violate the debt limit laws. What authority is there that SDCERS has any power to grant pension benefits to City workers? Can the City prevail in this action when it is the City's actions that allegedly violated the debt limit?

The parties should also be prepared to discuss whether the following raise material issues of fact in order to defeat the City's motion for summary adjudication:

1. Whether MPI and MPII (executed between SDCERS and the City) and the municipal employee pension legislation that implemented the agreements constitute a single "agreement" for purposes of section 1090. (*Thomson v. Call* (1985) 38 Cal.3d 633).

- a. The City argues there is one multi-party agreement even though MPI and MPII were agreements between SDCERS and the City, and the benefit enhancements

arose from negotiations between the City and the labor unions. (City's UMF Nos. 1-5; 63-65).

b. SDCERS argues the transactions involve different parties seeking different things for different purposes. MPI and II were contribution reduction agreements executed between SDCERS and the City. (SDCERS NOL at Ex. D, p. 6, ll. 2-7, p. 7, ll. 5-8; Ex. G, p. 9, ll. 6-9). SDCERS' Board did not consider or vote on the separate City-Union agreement. (City NOL at Ex. 6, pp. 13-32, Ex. 7, p.2).

c. Given the state of the evidence presented, is there a triable issue of fact that at least as far as the City is concerned their willingness to grant the increased benefits was contingent on SDCERS lowering the contribution amounts? Isn't this clear and undisputed at least as to MPI?

2. Whether the annual funding of pension benefits are contingent obligations.

a. The City argues the retroactive benefit increases are subject to the debt limit laws because the City incurred immediate liability by providing for an increased "retirement factor" used to calculate each employee's retirement benefit. (City's UMF Nos. 5, 15, 65, 65; City's NOL at Exs. 7, 8). Each employee received an immediate retroactive increase in pension benefits that he earned prior to 1996 and 2002. (City's UMF Nos. 5-6, 64-66).

b. Intervenors and SDCERS argue pension benefits are subject to contingencies which must be fulfilled before the vested right matures into a right to receive the accrued benefits. (Intervenor's UMF No. 1; City's NOL at Ex. 7) (Charter §§ 142, 143; *Kern, supra*, 29 Cal.2d at 855; *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (1984) 152 Cal.App.3d 113, 122).

3. The effect of the City's Third Supplemental Responses to Plaintiff's Request for Admissions [Set No. One] in *McGuigan v. City of San Diego, et al.*, Case No. GIC849883. (Intervenor's NOL at Ex. 51). In those responses, the City denies that, by the enactment of MP I and MP II, it created an unlawful funding strategy based on negotiations with SDCERS' Board and not based on actuarial science. The City also denies that, in amending the Municipal Code in conformance with MP I and MP II, it violated the City Charter or exceeded its power and permitted a funding scheme that conflicted with the Charter.

The court rules on SDCERS' written objections to evidence (joined by the Intervenors) as follows:

Objection Nos. 1-4: Overruled

Objection No. 5: Sustained

Objection Nos. 6-8: Overruled

Objection Nos. 9-61: Overruled

Objection Nos. 62-68: Overruled

Objection No. 69: Sustained

Objection No. 70: Overruled

Objection Nos. 71-84: Overruled

Objection No. 85: Sustained

Objection Nos. 86-90: Overruled

Objection Nos. 91-137: Overruled

Objection Nos. 138-139: Overruled

Objection Nos. 140-146: Overruled

Objection Nos. 147-149: Overruled

Objection Nos. 150-154: Overruled

Objection No. 155: Sustained

Objection No. 156: Overruled

Objection No. 157: Sustained

SDCERS' and the Intervenors' Requests for judicial notice are granted.

The City's objections to the declarations of Christine LaPinta and David Wescoe, and to the supplemental declaration of Scott Peters, are overruled.

The City's request for judicial notice is granted.

Any party who wishes to orally argue the motion must appear on Monday, June 26, 2006 at 9:00 am in Department 69 of the San Diego Superior Court. Failure to appear shall be deemed a waiver of oral argument and the Court will rule as appropriate.

IT IS SO ORDERED.

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