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7 **CALIFORNIA SUPERIOR COURT**  
8 **SAN DIEGO COUNTY**  
9

10 CITY OF SAN DIEGO,  
11  
12           Petitioner,  
13           v.

14 SAN DIEGO POLICE OFFICERS  
15 ASSOCIATION INCORPORATED,  
16  
17           Respondent.  
18

Case No. 2009-86499-CTL

**Findings After Hearing**

Judge David B. Oberholtzer  
Department C-67

19  
20           The cross-petitions of the City of San Diego and the San  
21 Diego Police Officers Association for writs of mandamus and the  
22 Police Officers' petition for a temporary injunction came on for  
23 hearing June 25, 2009, at 1:30 p.m. in Department 67 of the San  
24 Diego Superior Court, Judge David B. Oberholtzer, presiding.  
25 Daphne M. Anneet, Timothy Davis and Melissa Cowan of Burke,  
26 Williams & Sorensen appeared on behalf of the City; Michael J.  
27 Conger appeared on behalf of the Police Officers.  
28

1       The court, having considered the briefs, exhibits and  
2 testimony submitted by the parties, and having been fully  
3 advised by the argument of counsel, the court found the Deferred  
4 Retirement Option Plan is in the nature of "wages, hours and  
5 other terms and condition of employment" under the Meyers-  
6 Milias-Brown Act, Government Code §3504 and §3505, subdivision  
7 (a).  
8

9       The court further ordered the clerk to issue a writ of  
10 mandamus compelling the San Diego Police Officers Association to  
11 meet and confer in good faith with the City of San Diego  
12 regarding terms and conditions of employment, including but not  
13 necessarily limited to (1) the City's proposal to modify or  
14 eliminate the Deferred Retirement Option Plan, and (2) the  
15 application, if any, of the holding in *Allen v. City of Long*  
16 *Beach*, 45 Cal.2<sup>d</sup> 128 (1955) on the City's proposed changes.  
17

18       The court denied the Police Officers' cross-petition for a  
19 writ of mandamus and a preliminary injunction as follows:  
20

- 21       • The Police Officers Association's Cross-Petition for a  
22       writ of mandamus is denied;
- 23       • The Police Officers Association's petition for a  
24       preliminary injunction preventing the City from  
25       increasing the Deferred Retirement Option Plan entry  
26       age from age 50 to age 55 is denied, without  
27       prejudice;  
28

- 1           • The Police Officers Association's petition for a  
2 preliminary injunction to bar adjustment of interest  
3 rates imputed to Deferred Retirement Option Plan  
4 annuity deposits is denied;  
5
- 6           • The Court makes no findings regarding the Police  
7 Officers Association's Cross-Petition for declaratory  
8 relief.

9           Neither party requested a statement of decision. Nevertheless,  
10 the court will explain some of the reasons for its conclusion:  
11

12                   **1. THE CITY SEEKS TO ELIMINATE THE**  
13                   **DEFERRED RETIREMENT OPTION PLAN**

14           The San Diego City Employees' Retirement System manages a  
15 fund held in trust to pay the City's pensions obligations; its  
16 capital contributions consist of payroll deductions and  
17 contributions from the City's general fund. An independent Board  
18 invests and manages the money in the Retirement System through  
19 investment advisors, as well as actuaries to determine if the  
20 holdings are sufficient to cover the City's anticipated pension  
21 obligations ("actuarially sound"). For several years, the Board  
22 has reported the fund is not actuarially sound. As a result, the  
23 City is compelled to make additional contributions, amortized  
24 over an agreed number of years.<sup>1</sup>  
25

26 \_\_\_\_\_  
27 <sup>1</sup> Lawsuits filed by various employees and groups, including the Police  
28 Officers, have asserted they have a constitutional/statutory/common law right  
to an actuarially sound pension fund. Every court addressing the issue has  
ruled otherwise.

1 The City is reducing payroll costs to offset those additional  
2 contributions. One of those reductions is eliminating the  
3 Deferred Retirement Option Plan, a popular program with  
4 considerable participation, especially among peace officers.  
5

## 6 2. HISTORY OF THE DEFERRED RETIREMENT OPTION PLAN

7 The Deferred Retirement Option Plan was first offered to  
8 Police Officers in April 1997 as a three-year trial, on the  
9 belief it would reduce the City's contributions necessary to  
10 maintain an actuarially sound retirement trust fund. In 2002,  
11 at the recommendation of the Retirement Board, the City Council  
12 adopted the Deferred Retirement Option Plan as a permanent  
13 benefit, retroactive to April 1, 2000. At the time, the  
14 Retirement Board, City Manager and City Council all believed the  
15 Deferred Retirement Option Plan was saving the City money.  
16

17 The Police Officers assert the Deferred Retirement Option  
18 Plan is a vested, permanent part of the City's defined benefit  
19 plan, in part because the Municipal Code says so:  
20

21 §24.1401

- 22 (a) Effective April 1, 1997, a deferred  
23 retirement option plan (DROP) is created  
24 and offered to Members as an alternative  
25 method of benefit accrual in the Retirement  
26 System as set forth in this Division.  
27 (b) DROP is created to add flexibility to the  
28 Retirement System and its Members. It  
provides Members who elect to participate  
in DROP access to a lump sum benefit at the  
time of their actual retirement, in

1 addition to their normal monthly retirement  
2 allowance. DROP is intended to be cost  
3 neutral.

4 (c) DROP was initially on a trial basis for a  
5 period of three years, beginning April 1,  
6 1997. DROP became a permanent benefit  
7 effective April 1, 2000.

8 The City acknowledges §24.1401 uses the word "permanent," but  
9 points out the section is not self-perpetuating. Rather, the  
10 Deferred Retirement Option Plan has been a negotiated benefit in  
11 each Memorandum of Understanding between the City and the Police  
12 Officers since 1997, and the City Council separately passes an  
13 ordinance ratifying the Memorandums.<sup>2</sup> The City reasons if the  
14 Deferred Retirement Option Plan is a negotiated term of a two-  
15 year Memorandum, it ends when the Memorandum ends, irrespective  
16 of some careless language in §24.1401.

17 At least one court of appeal supports the City's view - *San*  
18 *Bernardino Public Employees Assn. v. City of Fontana*, 67  
19 *Cal.App.4<sup>th</sup>* 1215, 1220 (1998). The case did not involve pension  
20 benefits, however; municipal employees generally, and peace  
21 officers more specifically, are protected from arbitrary changes  
22 in their pensions. The tension between those protections and  
23 the City's intent to eliminate or change the Deferred Retirement  
24 Option Plan is the force giving this lawsuit its momentum.

25  
26 ///

27  
28 <sup>2</sup> Because these findings are not intended as a statement of decision; the  
court assumes the reader is versed in the background and issues.

1 **3. CURRENT NEGOTIATIONS BETWEEN THE CITY AND ITS POLICE OFFICERS**

2 The contract between San Diego's Police Officers and the City  
3 ended June 30, 2009. Despite long and intense negotiations,  
4 they could not agree on the terms of a 2009-2010 Memorandum of  
5 Understanding. The City declared an impasse, and issued its  
6 last, best and final offer April 9, 2009.  
7

8 None of it was good news to the Police Officers: Salaries  
9 are reduced by 1.5%, the City eliminated its pickup of the 4.1%  
10 of retirement contributions, and health care benefits are  
11 somewhat less generous. Other imposed conditions range from  
12 punitive (appearing so, anyway) to trivial: The president of  
13 SDPOA will no longer be given leave to perform those duties,<sup>3</sup> and  
14 starting July 1, 2009, an officer who attends a funeral must  
15 show written proof a relative actually died. (They might fib  
16 about taking a day off.)  
17

18 The City's last, best and final offer included notice of the  
19 its intent to meet and confer with the Police Officers about  
20 eliminating the Deferred Retirement Option Plan, or perhaps  
21 increasing the minimum participation age from 50 to 55.  
22

23 The City proposed as well lowering the interest rate paid on  
24 Deferred Retirement Option Plan annuities from 7.75% to 3.54%,  
25 although the City has no power to make that change - the  
26

27 <sup>3</sup> Consider what it means to have an officer on patrol who must as well act as  
28 the SDPOA's chief executive. If he or she gets into a tight spot, lack of  
sleep can be more than an annoyance.

1 proposal is actually a request to the Retirement Board, which  
2 alone sets the interest rate imputed to participants' individual  
3 accounts.<sup>4</sup> Municipal Code §24.1404, subdivision(c)(6). Neverthe-  
4 less, the City's proposal breaks new ground because, for the  
5 first time, the Board will be imputing a lower interest rate to  
6 Deferred Retirement Option Plan annuities than it does to  
7 longer-term retirement accounts.  
8

9 Finally, the City proposed negotiations to address the  
10 "impacts, if any, which result from the City defining the DROP's  
11 cost neutrality." The Police Officers felt the City was log  
12 rolling them, and suggested they would not negotiate over long-  
13 settled issues without setting conditions. The City concluded  
14 the Police Officers' reticence was unlawful, and petitioned for  
15 this writ of mandamus.  
16

#### 17 **4. WHY IT MATTERS: ADVANTAGES AND DISADVANTAGES**

18 A line of California Supreme Court decisions has established  
19 pension benefits offered to peace officers by the municipalities  
20 they serve are vested from the first day the officer is sworn.  
21 While the municipalities may amend those benefits throughout the  
22 officers' tenure, the benefit itself cannot be diminished: Any  
23 change to the pension resulting in a disadvantage to the  
24 officers must be matched by another change giving the officers a  
25  
26

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27 <sup>4</sup> The Retirement Board manages a single corpus distributed among various  
28 investments. A member's "account" is not segregated, and its "earnings" are  
based on actuarial principles, not investment returns.

1 new advantage to make up for it. *Allen v. City of Long Beach*, 45  
2 Cal.2<sup>d</sup> 128, 131 (1955).<sup>5</sup>

3 Any dispute over these issues is heard in the first instance  
4 by the Superior Court, which is to determine if the pension  
5 changes are reasonable, and whether the new advantages are  
6 substantially equal to the new disadvantages. *Id.* (See also,  
7 *Legislature v. Eu*, 54 Cal.3d 492, 528 (1991), confirming the  
8 general rule.) Therefore, by finding a benefit is "vested," a  
9 court is binding a city to pay its officers that benefit  
10 forever, apparently. (Or something of equal "advantage.")

11 The California Supreme Court has developed this doctrine over  
12 a number of years, but has never, regretfully, provided any  
13 guidance how to measure objectively an advantage against a  
14 disadvantage. The concept of a vested benefit is better  
15 defined, but not always easy to apply.

16  
17  
18 **(a) This Deferred Retirement Option Plan Can Be Changed**

19 The Police Officers urge the court to place its imprimatur on  
20 the word "permanent" in Municipal Code §24.1401, subdivision  
21 (c), and find the Deferred Retirement Option Plan (subdivision  
22 (a)) is an advantage as discussed in *Allen v. City of Long*  
23 *Beach*. The court cannot.

24  
25 Initially, these are statutes, not contracts, and the City is  
26

27 <sup>5</sup>The Police Officers prefer *Betts v. Board of Administration*, 21 Cal.3d 859  
28 (1978) as controlling authority. While *Betts* has appealing language for the  
Police Officers, its holding addresses altogether different facts.



1 presumed not to have bound itself contractually by a statute,  
2 even if some of the words used imply otherwise. *Dodge v. Chicago*  
3 *Board of Education*, 302 U.S. 74, 77-81 (1937). (But see, *Indiana*  
4 *ex. Rel. Anderson v. Brand*, 303 U.S. 95 (1938).) Nothing in  
5 §24.1401 (nor any other code section, insofar as the court can  
6 tell) suggests the City intended to bind itself forever to  
7 provide a Deferred Retirement Option Plan in its present form,  
8 or at all. In point of fact, Municipal Code §24.1402.1  
9 eliminates Deferred Retirement Option Plan for members hired  
10 after July 1, 2005, to which the Police Officers presumably  
11 agreed in their 2005-2006 memorandum of understanding.  
12

13       Additionally, as discussed above, the Deferred Retirement  
14 Option Plan was proposed by the City in the context of  
15 negotiating pay, benefits and work conditions. The use of this  
16 process does not suggest the sort of permanence the Police  
17 Officers impart to it. Each memorandum of understanding details  
18 an agreement of the City and its Police Officers beginning July  
19 1 and ending 24 months later, after which they can agree to new  
20 and/or different pay, benefits and work conditions, and whatever  
21 else they agree to and the City Council will adopt.<sup>6</sup> *City of*  
22 *Fontana*, 67 Cal.App.4<sup>th</sup> at 1220.  
23

24       The Police Officers believed the Municipal Code meant  
25 "permanent" because it said "permanent." If those words were in  
26

27 <sup>6</sup> Government Code §3505.1 states a memorandum of understanding is not binding  
28 until adopted by the municipality; *Glendale City Employees Assn. v. City of*  
*Glendale* holds another view. 15 Cal.3d 328, 336 & 337 (1975).

1 a private contract, this court would likely protect their  
2 reliance. But government bodies operate under a different  
3 canon, and the Police Officers cannot expect a municipal code  
4 section to be immutable. Unless the City has offended a  
5 recognized prerogative or violated state or federal laws, the  
6 Municipal Code means whatever the City Council says it means.  
7

8 In this instance, the City concluded the anticipated  
9 savings (if there are any) balanced the sure and certain  
10 diminished morale of its peace officers. Absent a clear and  
11 unambiguous statement from the City it would never change, the  
12 Deferred Retirement Option Plan can be altered or eliminated.  
13

14 **(b) Meyers-Milias-Brown Compels the Police Officers**  
15 **to Meet & Confer with the City**

16 The Meyers-Milias-Brown Act (adopted 1961) provides a  
17 framework within which a municipality, its police officers (and  
18 other public employees) negotiate the terms of their memorandums  
19 of understanding, including "wages, hours, and other terms and  
20 conditions of employment." Government Code §3505. Once agreed  
21 to by the police officers and the municipality's negotiators,  
22 the memorandum is submitted to the legislative body of the  
23 municipality for adoption.  
24

25 Notwithstanding the present dispute, by negotiating over  
26 their terms, the City and the Police Officers have tacitly  
27 acknowledged pensions are subsumed into wages, hours, and other  
28

1 terms and conditions of employment. In this instance, as one  
2 prerequisite to conferring on the Deferred Retirement Pension  
3 Plan, the Police Officers asked the City to provide a  
4 computation of the "advantages" they stand to lose. The City  
5 declined, asserting Deferred Retirement Option Plan is not *that*  
6 kind of pension benefit, so no analysis is required.

8 Meyers-Milias-Brown does not suggest it would honor pre-  
9 conditions to the Government Code §3505 duty to meet and confer,  
10 and the court is making its orders accordingly. Of course, the  
11 Police Officers may ask the court to consider those  
12 disadvantages eventually, but under Meyers-Milias-Brown,  
13 everything begins with a good faith meeting, the result of which  
14 will be to present these issues backed by real facts.

16 **5. COLLATERAL ISSUES ADDRESSED AND DECIDED**

17 The parties have submitted several issues that, although not  
18 directly affecting the writ of mandamus, the court found  
19 necessary to decide in reaching its decision:

21 **(a) City Council's Adoption of Ordinance Incorporating a**  
22 **Memorandum of Understanding is Conclusive**

23 The City has suggested the Deferred Retirement Option Plan  
24 was never validated, because the Police Officers did not obtain  
25 "a majority vote of the members" in 1997 as required to change a  
26 pension benefit by City Charter §143.1. According to the City,  
27 this omission disposes of the Police Officers' argument the  
28

1 Deferred Retirement Option Plan is no and never was a vested and  
2 continuing right. The Police Officers have gleefully provided  
3 documents from the City saying exactly the opposite, which may  
4 account for the City's tepid presentation of the issue. The  
5 court has not considered these documents.<sup>7</sup>

6  
7 Whether and how the Police Officers conducted a vote is  
8 irrelevant: The City Council codified the memorandum of  
9 understanding, and the Deferred Retirement Option Plan became  
10 part of the Municipal Code. The court looks to the Ordinance as  
11 written, not the process of its adoption. *Fletcher v. Peck*, 6  
12 U.S. 87, 131 (1810); *People v. Burt*, 43 Cal. 560, 564 (1872).

13  
14 **(b) The Ninth Circuit Has Not Precluded the Police**  
15 **Officers' Contentions**

16 On June 10, 2009, the Ninth Circuit filed its opinion in  
17 *San Diego Police Officers Assn. v. San Diego City Employees*  
18 *Retirement Fund*, 568 F.3d 725 (2009), an appeal from summary  
19 judgment adverse to the Police Officers. The Ninth Circuit's  
20 holding in that case was a change in the contribution rates from  
21 the earned salary of Officers enrolled in the Deferred  
22 Retirement Option Plan does not violate the Contract Clause of  
23 the U.S. Constitution, despite a decrease in the Officers' take  
24 home pay. *Id.* at 739. This unsurprising result has nothing to do  
25 with these competing Petitions, the Ninth Circuit's comments on

26  
27 <sup>7</sup>Some of the documents submitted by the Police Officers are confidential memos  
28 to the City from their attorneys. Neither party has explained how they  
became exhibits in this hearing.

1 other pension issues notwithstanding. *Hart v. Burnett*, 15 Cal.  
2 530, 598-599 (1860).

3  
4 **6. THE CONFLICT BETWEEN THE MEYERS-MILIAS-BROWN ACT AND ALLEN**  
5 **v. CITY OF LONG BEACH WILL BE ADDRESSED ANOTHER DAY**

6 Meyers-Milias-Brown and *Allen v. City of Long Beach* are a  
7 poor fit. The former is a statute with a comprehensive set of  
8 procedures providing ". . . a reasonable method of resolving  
9 disputes regarding wages, hours, and other terms and conditions  
10 of employment." Government Code §3500. The latter is a common  
11 law concept to protect police officers' pensions - any change  
12 which disadvantages those officers must be balanced by a new  
13 advantage.

14 The conflict arises when the municipality and its police  
15 officers cannot agree on a memorandum of understanding, and the  
16 municipality makes its last, best and final offer, declares an  
17 impasse, and imposes that last, best offer as the controlling  
18 labor contract. Government Code §3505.4.

19 One way to read *Allen v. City of Long Beach* is the last, best  
20 and final offer cannot diminish vested pension "advantages."  
21 Messrs. Brown, Milias and Meyers presumably knew about *Allen v.*  
22 *City of Long Beach* when they proposed their Act, but do not  
23 mention the conflict (if they saw one) in primary sources.  
24

25 Research does not disclose an instance where a court of  
26 review has addressed this issue head on in a published decision:  
27  
28

1 Does *Allen v. City of Long Beach* place a limit on a  
2 municipality's power to impose a pension plan with fewer  
3 advantages as part of its last, best and final offer? This  
4 court cannot resolve that issue now, but it remains the  
5 crocodile in the bathtub.  
6

7 **7. ORDERS**  
8

- 9 1. The City and the Police Officers are ordered to meet and  
10 confer without preconditions and without artificial limits  
11 on the scope of their negotiations.  
12  
13 2. The court finds the parties have a dispute regarding  
14 matters about which reasonable people of good faith may  
15 disagree, and declines to award sanctions.  
16  
17 3. Because this hearing took place near the end of the fiscal  
18 year, the court orders that sworn officers who were active  
19 participants in the Deferred Retirement Option and  
20 otherwise eligible as of June 25, 2009, may elect to  
21 terminate their participation in the Deferred Retirement  
22 Option Plan and retire from City employment not later than  
23 close of business on July 27, 2009. Any such election  
24 shall be deemed to have been made on or before June 29,  
25 2009, *nunc pro tunc*.  
26  
27 4. The Court retains jurisdiction for enforcement and such  
28 other and further issues as may be presented.

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

Central  
330 West Broadway  
San Diego, CA 92101

SHORT TITLE: Petition of City of San Diego

CLERK'S CERTIFICATE OF SERVICE BY MAIL

CASE NUMBER:

37-2009-00086499-CU-PT-CTL

I certify that I am not a party to this cause. I certify that a true copy of the Proposed Findings and Proposed Order After Hearing was mailed following standard court practices in a sealed envelope with postage fully prepaid, addressed as indicated below. The mailing and this certification occurred at San Diego, California, on 09/28/2009.

Clerk of the Court, by: \_\_\_\_\_, Deputy

  
P. Legler

DAPHNE MARY ANNEET  
444 S. FLOWER STREET, STE. 2400  
LOS ANGELES, CA 90071

Michael Conger  
PO BOX 9374  
RANCHO SANTA FE, CA 92067

 Additional names and address attached.