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9 San Diego Police Officers Association Incorporated

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SAN DIEGO

12 CITY OF SAN DIEGO,	)	CASE NO: 37-2009-00086499-CU-PT-CTL
)	
13 Petitioner and Plaintiff,)	
)	
14 v.	)	SAN DIEGO POLICE OFFICERS
	)	ASSOCIATION INCORPORATED'S
15 SAN DIEGO POLICE OFFICERS	)	ANSWER TO PLAINTIFF'S
ASSOCIATION INCORPORATED,	)	PETITION FOR WRIT OF
16 and DOES 1 to 100, inclusive,	)	MANDATE AND CROSS-
	)	PETITION FOR WRIT OF
17 Respondent and Defendant.	)	MANDATE, DECLARATORY AND
	)	INJUNCTIVE RELIEF
)	
	)	Judge: Hon. David B. Oberholtzer
	)	Dept: C-67
	)	Action Filed: April 1, 2009

18
19 Defendant San Diego Police Officers Association Incorporated ("SDPOA") hereby
20 answers the Petition for Writ of Mandate and Complaint for Declaratory Relief ("Complaint") of
21 Plaintiff City of San Diego ("Plaintiff") on file herein as follows:

22 **GENERAL DENIAL**

23 Pursuant to California Code of Civil Procedure Section 431.30(d), Defendant SDPOA
24 generally denies each and every allegation in each and every paragraph and cause of action in
25 Plaintiff's unverified Complaint, denies that Plaintiff is entitled to the relief claimed, or any
26 relief, on the grounds alleged or otherwise.

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28 ///

1 19.)

2 6. All employees of the City, including all SDPOA members, are required to
3 participate in the City Employees' Retirement System. (San Diego Municipal Code ("SDMC"),
4 § 24.0104(a) ["Membership in the Retirement System shall be compulsory and a condition of
5 employment for all members of the classified and unclassified service"].¹) "The management
6 and control of the Retirement System is vested in the Board of Administration."² (SDMC, §
7 24.0401.)

8 7. "Policemen . . . who have had ten years of service . . . may be retired at the age of
9 fifty-five years, except such policemen . . . may be given the option to retire at the age of fifty
10 years after twenty years of service . . ." (City Charter, article IX, § 141; SDMC, § 24.0403
11 [providing details of safety retirement allowance determination].)

12 8. One of the retirement benefits available to City employees is the Deferred
13 Retirement Option Plan ("DROP").

14 9. "Effective April 1, 1997, a deferred retirement option plan (DROP) [was] created
15 and offered to Members as an alternative method of benefit accrual in the Retirement
16 System . . ." (SDMC, § 24.1401(a).)

17 10. "DROP [was] created to add flexibility to the Retirement System and its
18 Members. It provides Members who elect to participate in DROP access to a lump sum benefit
19 at the time of their actual retirement, in addition to their normal monthly retirement allowance."
20 (SDMC, § 24.1401 (b).)

21 11. "Any Member who is eligible for a service retirement is eligible to participate in
22 DROP . . ." (SDMC, § 24.1402(a).³)

23

24

25 ¹ A "Member" means any person employed by the City of San Diego who actively
26 participates in and contributes to the Retirement System, and who will be entitled, when eligible,
to receive benefits from the Retirement System. There are three classes of Member: General,
Safety, and Elected Officer." (SDMC, § 24.0103.) Police officers are safety members. (*Ibid.*)

27

28 ² The Board of Administration is commonly referred to as the San Diego City
Employees' Retirement System, or "SDCERS," which maintains a web site at www.sdcers.org.

29

³ SDPOA members are eligible to retire at age 50. (SDMC, § 24.0403, Table 1.)

1 12. Among other things, “[b]efore a Member may participate in DROP, he or she
2 must voluntarily and irrevocably” (1) stop accruing regular retirement benefits and (2) “agree to
3 leave City employment” within 60 months of entering DROP. (SDMC, §§ 24.1402(b)(1), (b)(4),
4 (b)(8).)

5 13. Because a City employee entering DROP no longer accrues retirement benefits,
6 “[t]he Member and the City . . . stop making employer and employee contributions for the
7 Member on the day the Member enters DROP.” (SDMC, § 24.1405(a).)

8 14. While in DROP, a City employee continues to receive a paycheck and SDCERS
9 deposits the employee’s service retirement payments into a DROP account. (City Pet., ¶ 34;
10 SDMC, § 24.14042(a).)

11 15. The amount credited to a DROP account includes the employee’s service
12 retirement, any cost-of-living adjustments, contributions equal to 3.05 percent of the member’s
13 base compensation paid by both the employee and the City, and interest. (SDMC, §
14 24.14042(c)(1-8).)

15 16. DROP was ended for newly hired City employees in 2005, and City employees
16 “hired or assuming office on or after July 1, 2005, may not participate in DROP.” (SDMC, §
17 24.1402.1.)

18 17. Beginning with a memorandum of understanding (“MOU”) effective on July 1,
19 1998, the City and the SDPOA entered into five separate contracts. The City and the SDPOA
20 agreed to contracts effective July 1, 2008 through June 30, 2009 (City Pet., Exh. B); July 1, 2007,
21 through June 30, 2008; July 1, 2003, through June 30, 2005; July 1, 2000, through June 30, 2002;
22 and July 1, 1998, through June 30, 2000.

23 18. From July 1, 2002, through June 30, 2003, and from July 1, 2005, through June
24 30, 2007, the City and the SDPOA were unable to agree to terms, the effect of which is that the
25 previous MOU remains effective until new terms are agreed to by the parties.

26 19. Each of these contracts, in Article 44 entitled “RETIREMENT,” contained terms
27 related to SDPOA members’ pension benefits.

28 20. Article 44(6) of each the MOUs contained provisions related to the “1997 Benefit

1 Changes.” They all provide: “The City and the [SD]POA, having met and conferred, have
2 agreed to benefit improvements to the City Employees Retirement System, The City Council has
3 approved these changes [through ordinances and] subsequently the improvements were approved
4 by a majority vote of System Members in April 1997.” “Those changes include the
5 following: . . . A Deferred Retirement Option Plan”

6 21. Each MOU then explains DROP, and each MOU contains the following identical
7 language: “Interest will be credited to the Member’s DROP account in the same manner and at
8 the same rate that interest is credited to employee CERS accounts. The Member is 100% vested
9 in the DROP from its inception.”

10 22. After the City implemented DROP, it touted DROP in its marketing and
11 promotional brochures for new hires.

12 23. During negotiations between the City and the SDPOA in the Spring of 2009 for an
13 MOU governing the period after the current MOU expires on June 30, 2009, the City proposed
14 eliminating DROP for all SDPOA members not yet in DROP.

15 24. The SDPOA negotiating team responded it was not authorized to negotiate this
16 retirement benefit away from SDPOA members because of the language in five previous MOUs
17 that “[t]he Member is 100% vested in the DROP from its inception.”

18 25. The City informed the SDPOA that a term it wanted in any new MOU would
19 include increasing the eligible entry age for SDPOA members to participate in DROP from age
20 50 to age 55. The City acknowledged that this provision “[w]ould likely generate the same
21 savings as elimination of DROP.”

22 26. When the SDPOA and the City could not reach agreement upon a new MOU, the
23 City Council voted on April 14, 2009, to impose the terms of its “Last Best and Final Offer” on
24 the SDPOA. The City’s imposed contract terms include the following changes to Article 44: (1)
25 “Effective July 1, 2009, a unit safety member must be age 55 or older . . . to participate in
26 DROP[,]” (2) Effective July 1, 2009, interest will be credited to the Member’s DROP account at
27 a rate determined by the SDCERS Board.”

28 27. On April 1, 2009, shortly before the City imposed contract terms on the SDPOA,

1 it brought this action seeking a writ of mandate “[d]irecting the SDPOA to meet and confer with
2 the City regarding the City’s proposal to eliminate DROP” for SDPOA members hired before
3 July 1, 2005.

4 28. The City also seeks a judicial declaration that: (1) the SDPOA is “legally
5 obligat[ed] to meet and confer with the City regarding the City’s proposal to eliminate DROP,”
6 (2) the SDPOA’s refusal to meet and confer with the City is a “*per se* violation of [the SDPOA’s]
7 obligation under the MMBA,” and (3) “DROP . . . is a term and condition of employment within
8 the scope of representation under the MMBA.”

9 29. In this cross petition, the SDPOA seeks to invalidate the City’s attempt to increase
10 the DROP entry age to age 55, and to eliminate the provision guaranteeing interest for DROP
11 accounts—“Interest will be credited to the Member’s DROP account in the same manner and at
12 the same rate that interest is credited to employee CERS accounts.”

13 30. “MOUs are binding agreements between local agencies and designated employee
14 representatives.” (*National City Police Officers’ Assoc. v. City of National City* (2001) 87
15 Cal.App.4th 1274, 1278.) In that case, the Court stated:

16 “[i]n rejecting a contention that an MOU adopted by a local governing board
17 could be unilaterally altered by such board, the Supreme Court in *Glendale City*
18 *Employees’ Assn. v. City of Glendale* (1975) 15 Cal.3d 328, 336 stated: ‘The
19 Legislature designed the MMBA, moreover, for the purpose of resolving labor
20 disputes. [Citation.] But a statute which encouraged the negotiation of
21 agreements, yet permitted the parties to retract their concessions and repudiate
22 their promises whenever they choose, would impede effective bargaining. Any
23 concession by a party from a previously held position would be disastrous to that
24 party if the mutual agreement thereby achieved could be repudiated by the
25 opposing party. Successful bargaining rests upon the sanctity and legal viability
26 of the given word.’ Thus, ‘[i]n applying the Meyers-Milias-Brown Act, “the
27 courts have uniformly held that a memorandum of understanding, once adopted by
28 the governing body of a public agency, becomes a binding agreement.”’
(*Glendale*, at p. 337.)”

24 Thus, the five MOUs, and the terms thereof must be enforced by this Court.

25 31. “[B]oth the federal and state contract clauses protect the vested pension rights of
26 public officers and employees from unreasonable impairment.” (*California Ass’n of*
27 *Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 383.)

28 32. “While some jurisdictions view public employees’ retirement rights as a gratuity,

1 California is firmly committed to the proposition that these rights are contractual; that they are
2 'vested' in the sense that the lawmakers' power to alter them after they have been earned is quite
3 limited." (*Ibid.*) "By entering public service an employee obtains a vested contractual right to
4 earn a pension on terms substantially equivalent to those then offered by the employer." (*Ibid.*)

5 33. "A long line of California decisions has settled the principles applicable to [this
6 situation]. A public employee's pension constitutes an element of compensation, and *a vested*
7 *contractual right to pension benefits accrues upon acceptance of employment.* Such pension
8 right *may not be destroyed*, once vested, without impairing a contractual obligation of the
9 employing public entity." (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863, italics
10 added.)

11 34. Prior to retirement:

12 "[a]n employee's vested contractual pension rights may be modified . . . for the
13 purpose of keeping a pension system flexible to permit adjustments in accord with
14 changing conditions and at the same time maintain the integrity of the system.
15 [Citations.] Such modifications must be reasonable, and it is for the courts to
16 determine upon the facts of each case what constitutes a permissible change. To
17 be sustained as reasonable, alterations of employees' pension rights must bear
18 some material relation to the theory of a pension system and its successful
19 operation, *and changes in a pension plan which result in disadvantage to*
20 *employees should be accompanied by comparable new advantages.'*" (*Betts* at p.
21 864, italics in original; accord, *Maffei v. Sacramento County Employees*
22 *Retirement System* (2002) 103 Cal.App.4th 993, 999-1000; *Board of*
23 *Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1132-1133; *Valdes v. Cory*
24 (1983) 139 Cal.App.3d 773, 783-784.)

25 35. DROP is a vested pension benefit. Each of the MOUs between the City and the
26 SDPOA since 1998 state: "The Member is 100% vested in the DROP from its inception."

27 36. The disadvantageous increase in the DROP entry age to age 55 imposed by the
28 City will not be accompanied by any comparable new advantages.

37. "The City of San Diego is a charter city." (*Grimm v. City of San Diego* (1979) 94
Cal.App.3d 33, 37.)

38. "It can make and enforce all ordinances and regulations regarding municipal
affairs subject only to the restrictions and limitations imposed by the City Charter, as well as
conflicting provisions in the United States and California Constitutions and preemptive state

1 law.” (*Ibid.*) “

2 39. Consequently, ‘(w)ithin its scope, such a charter is to a city what the state
3 Constitution is to the state.’” (*Ibid.*, quoting *San Francisco Firefighters v. City and County of*
4 *San Francisco* (1977) 68 Cal.App.3d 896, 989-899.)

5 40. “‘The charter operates not as a grant of power, but as an instrument of limitation
6 and restriction on the exercise of power over all municipal affairs which the city is assumed to
7 possess’” (*Grimm, supra*, at p. 38, quoting *City of Grass Valley* (1949) 34 Cal2d 595, 598-
8 599.)

9 41. San Diego City Charter, article IX, section 143.1(a) provides in relevant part: “No
10 ordinance amending the retirement system which affects the benefits if any employee under such
11 retirement system shall be adopted without the approval of a majority vote of the members of
12 said system.”

13 42. The City may not lawfully increase the entry age for DROP to age 55 without the
14 Charter-required vote, which has not occurred.

15 43. In five separate MOUs between the City and the SDPOA since 1998, the City has
16 agreed that “[i]nterest will be credited to the Member’s DROP account in the same manner and at
17 the same rate that interest is credited to employee CERS accounts.”

18 44. As the Supreme Court explained in *Glendale, supra*:

19 “Why negotiate an agreement if either party can disregard the provisions. What
20 point would there be in reducing it to writing, if the terms of the contract were of
21 no legal significance? Why submit the agreement to the governing body for
22 determination if its approval were without significance? What integrity would be
23 left in government if government itself could attack the integrity of its own
24 agreements? . . . Successful bargaining rests upon the sanctity and legal viability
25 of the given word. [¶] In applying the Meyers-Milias-Brown Act, ‘the courts have
26 uniformly held that a memorandum of understanding, once adopted by the
27 governing body of a public agency, becomes a binding agreement.’ [Citation.]”
28 (*Glendale, supra*, 15 Cal.3d at p. 336.)

25 45. Presently, the rate credited to employee CERS accounts, and to DROP accounts,
26 is 7.75 percent.

27 46. The disadvantage to SDPOA members caused by reducing the interest rate on
28 DROP accounts imposed by the City will not be accompanied by any comparable new

1 advantages.

2 47. The City has not conducted a vote under Charter section 143.1 necessary to reduce
3 the DROP interest rate paid to SDPOA members.

4 **FIRST CAUSE OF ACTION FOR A WRIT OF MANDATE**

5 48. Cross-petitioner incorporates by reference and reallege paragraphs 1 through 47 as
6 though fully set forth herein.

7 49. The City has, and continues to have, an obligation to maintain the DROP entry
8 age for members of the SDPOA who were employed by the City before July 1, 2005, at 50 and
9 the promised interest rate for SDPOA members' DROP accounts at the rate credited to employee
10 City Employees' Retirement System accounts.

11 50. Unless the City is enjoined from increasing the DROP entry age for members of
12 the SDPOA from age 50 to age 55, and from reducing the promised interest rate for SDPOA
13 members' DROP accounts below the interest rate credited to employee City Employees'
14 Retirement System accounts, the City will do both.

15 51. The SDPOA has no plain, speedy, or adequate remedy at law.

16 52. Therefore, this Court should issue a peremptory writ of mandate directing the City
17 to maintain the DROP entry age for members of the SDPOA at 50 and the promised interest rate
18 for SDPOA members' DROP accounts at the rate credited to employee City Employees'
19 Retirement System accounts.

20 **SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF**

21 53. Cross-petitioner incorporates by reference and reallege paragraphs 1 through 47 as
22 though fully set forth herein.

23 54. An actual and justiciable controversy has arisen, and now exists, between the
24 SDPOA, on the one hand, and the City, on the other hand, as to whether the City may increase
25 the DROP entry age for members of the SDPOA from age 50 to age 55, and whether the City
26 may reduce the promised interest rate for SDPOA members' DROP accounts.

27 55. The City contends that it may do both.

28 56. The SDPOA contends that the City may do neither.

1 57. Pursuant to Code of Civil Procedure section 1060, cross-petitioner desires a
2 judicial determination that City may not increase the DROP entry age for members of the
3 SDPOA from age 50 to age 55, and that the City is obligated to pay the promised interest rate for
4 SDPOA members' DROP accounts.

5 58. Such a judicial determination is necessary and appropriate at this time so that the
6 parties can ascertain their respective rights and duties.

7 59. There are no administrative remedies available to cross-petitioners to compel the
8 relief sought herein. Therefore, cross-petitioner has exhausted all available administrative
9 remedies, including efforts by its president and attorney to resolve this matter without the
10 necessity of litigation.

11 60. Cross-petitioner has no plain, speedy or adequate remedy at law.

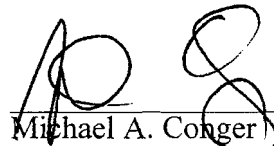
12 **WHEREFORE, cross-petitioner prays that, following a duly noticed hearing, the**
13 **Court:**

- 14 1. Issue a preliminary and permanent prohibitory injunction preventing an increase
- 15 of the DROP entry age for members of the SDPOA from age 50 to age 55, and
- 16 2. A preliminary and permanent prohibitory injunction preventing the City of San
- 17 Diego from reducing the promised interest rate for SDPOA members' DROP
- 18 accounts below the interest rate credited to employee City Employees' Retirement
- 19 System accounts.
- 20 3. Award respondent and cross-petitioner the costs of suit herein;
- 21 4. Award respondent and cross-petitioner reasonable attorney fees; and
- 22 5. Award such other and further relief as it deems necessary and proper.

23
24 Dated: June 1, 2009

LAW OFFICE OF MICHAEL A. CONGER

25
26 By:



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Attorney for San Diego Police Officers
Association Incorporated