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Michael A. Conger

Civil Litigation
Employment Law
Business Law
Wrongful Death
Serious Injury

May 14, 2009

Via Fax and U.S. Mail

Mayor Jerry Sanders
City of San Diego
City Administration Building
202 C Street, 11th Floor
San Diego, CA 92101
(Fax No. (619) 236-7228)

Jan Goldsmith, City Attorney
Office of the City Attorney
City of San Diego
1200 Third Avenue, Suite 1620
San Diego, CA 92101
(Fax No. (619) 236-7215)

Re: City of San Diego v. San Diego Police Officers Association
San Diego Superior Court Case No. 37-2009-00086499

Dear Mayor Sanders and Mr. Goldsmith:

I have been retained by the San Diego Police Officers Association to defend it in the referenced litigation brought by the City of San Diego ("DROP Litigation"). I am in the process of preparing cross claims, which I anticipate filing in the next several days. I write, at my client's request, to (1) place the City on notice of my client's intentions and (2) again offer to sit down and attempt to constructively (and lawfully) solve problems related to the Deferred Retirement Option Program ("DROP").

As you have probably been told by Ms. Anneet, the SDPOA intends to pursue at least two cross-claims against the City in the DROP Litigation. The first cross-claim will relate to the City's intention to increase the entry-eligible date for DROP to age 55, instead of age 50. The second cross-claim relates to the City's payment of less than the agreed upon interest to DROP accounts. My client intends to seek a temporary restraining order and preliminary injunction as to both issue to prevent the irreparable harm to scores of police officers who will be forced by uncertainty into early retirement before July 1, 2009.

A decade's worth of agreements between the City and the SDPOA plainly stated: "Interest will be credited to the Member's DROP account in the same manner and at the same rate that interest is credited to employee CERS accounts. The Member is 100% vested

in the DROP from its inception."

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

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

Moreover, San Diego City Charter, article IX, section 143.1(a) provides, in relevant part: "No ordinance amending the retirement system which affects the benefits if any employee under such retirement system shall be adopted without the approval of a majority vote of the members of said system." The City's attempt to increase the entry age for DROP to age 55 was imposed without such approval and therefore violates the City Charter. We are informed that SDCERS will not implement this change because no such vote of members was taken.

"[B]oth the federal and state contract clauses protect the vested pension rights of public officers and employees from unreasonable impairment." (*California Ass'n of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 383.) "While some jurisdictions view public employees' retirement rights as a gratuity, California is firmly committed to the proposition that these rights are contractual; that they are 'vested' in the sense that the lawmakers' power to alter them after they have been earned is quite limited." (*Ibid.*) "By entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer." (*Ibid.*)

"A long line of California decisions has settled the principles applicable to [this situation]. A public employee's pension constitutes an element of compensation, and *a vested*

contractual right to pension benefits accrues upon acceptance of employment. Such pension right *may not be destroyed,* once vested, without impairing a contractual obligation of the employing public entity." (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863, italics added.[1])

The SDPOA does not desire to litigate these issues in Court, but the City has left it no choice. Because the City implemented illegal terms on the SDPOA, it will be seeking to have the Court set aside *all of the implementing ordinances* and order the City to return to the bargaining table with the SDPOA prior to the City implementing any new final position. Therefore, it would seem practical for the parties to return to the bargaining table as soon as possible to avoid unnecessary litigation. Please contact me within the next few days if you would like to meet and discuss potential resolution of these issues.

Very truly yours,

Michael A. Conger

MAC/pbm

cc: Daphne M. Anneet, Esquire (Via Fax No. (213) 236-2700)
Richard H. Benes, Esq. (Via Fax No. (619) 223-7746)
Client

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[1] In *Maffei v. Sacramento County Employees Retirement System* (2002) 103 Cal.App.4th 993, 999-1000, the court stated:

> "An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system . . . . Such modifications must be reasonable . . . [and to] be sustained as reasonable, alterations of employees' pension rights must [1] bear some material relation to the theory of a pension system and its successful operation, and [2] changes in a pension plan which will result in disadvantage to employees should be accompanied with comparable new advantages."

However, here there is no evidence that the disadvantageous changes to DROP imposed by the City will be accompanied by any comparable new advantages.