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9 Joseph Krouss and Scott A. Thompson

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

12	GUY McELROY, DAVID COOKSON, JOSEPH)	CASE NO: 37-2009-00081178-CU-MC-CTL
13	KROUSS and SCOTT A. THOMPSON,)	
14	Plaintiffs,)	FIRST AMENDED COMPLAINT
15	v.)	FOR WRIT OF MANDATE
16	CITY OF SAN DIEGO, and DOES 1 to 20,)	
17	inclusive,)	
18	Defendants.)	Judge: Hon. Judith F. Hayes
19		Dept: C-68
20		Complaint Filed: January 13, 2009

- 21 1. Plaintiff Guy McElroy ("McElroy") is a San Diego Police Officer and employed by
22 the City of San Diego ("the City").
- 23 2. Plaintiff David Cookson ("Cookson") is a San Diego Police Officer and employed
24 by the City.
- 25 3. Plaintiff Joseph Krouss ("Krouss") is a San Diego Police Officer and employed by
26 the City.
- 27 4. Plaintiff Scott A. Thompson ("Thompson") is a San Diego Police Officer and
28 employed by the City.
- 29 5. The City is a municipal corporation with all municipal powers, functions, rights,
30 privileges and immunities authorized by the Constitution and laws of the State of California. The
31 City is a "charter city" under Article XI of the California Constitution, which authorizes the
32 organization of municipal corporations (cities) as either "general law cities" or "charter cities."

1 The City is authorized to enact ordinances consistent with its charter and is required to adhere to
2 its own ordinances.

3 6. The true names or capacities, whether individual, corporate, associate, or
4 otherwise, of defendants DOES 1 to 20, inclusive, are unknown to plaintiffs, who therefore sue
5 said defendants by such fictitious names.

6 7. Plaintiffs are informed and believe and thereon allege that each of the defendants
7 designated herein as a DOE is responsible in some manner for the events and happenings herein
8 referred to and caused injury and damages as herein alleged. Plaintiffs will seek leave of court to
9 amend this complaint, if necessary, to set forth the true names and capacities of such named
10 defendants when their identities become known to them.

11 8. Plaintiffs are informed and believe and thereon allege that each defendant named
12 in this action, including DOE defendants, at all relevant times, was the agent, ostensible agent,
13 servant, employee, representative, assistant, joint venturer, and/or co-conspirator of each of the
14 other defendants, and was at all times acting within the course and scope of his, her, or its
15 authority as agent, ostensible agent, servant, employee, representative, joint venturer, and/or
16 co-conspirator, and with the same authorization, consent, permission or ratification of each of the
17 other defendants.

18 **ADDITIONAL FACTUAL ALLEGATIONS**

19 9. In 1927, the City established a defined benefit pension plan to provide retirement,
20 disability, death, and retiree health benefits to City employees and their beneficiaries (“the
21 retirement plan”).

22 10. Pursuant to the San Diego City Charter, Article IX, sections 141 through 148.1,
23 Article X, section 1, and the San Diego Municipal Code section 24.0100, *et seq.*, each of the
24 plaintiffs makes contributions to the retirement plan, and the City makes substantially equal
25 contributions on the plaintiffs’ behalf which are considered “additional elements of
26 compensation.”

27 11. Both the contributions made by plaintiffs and the City, and the ultimate retirement
28 allowances paid on retirement, are based in part on plaintiffs’ “Base Compensation.”

1 12. Pursuant to San Diego Municipal Code section 24.0103, as amended effective
2 July 1, 2000, “[a] complete listing of included and excluded items of compensation or
3 remuneration is memorialized in a document entitled ‘Earnings Codes Included in Retirement
4 Base Compensation [’] [the Earnings Codes Document], which is prepared annually and which
5 shall be kept on file in the Office of the City Clerk, and also maintained by the City Manager, the
6 City Auditor and the Personnel Director.”

7 13. In exchange for particular duties performed by the plaintiffs, they are or were each
8 paid either “Motorcycle Care Pay” or “Canine Care Pay.”

9 14. Both Motorcycle Care Pay and Canine Care Pay were included in Retirement Base
10 Compensation in the Earnings Code Document which was effective on July 1, 2000. They were
11 both also listed in at least two Earnings Code Documents published before July 1, 2000, and at
12 least five Earnings Code Documents since July 1, 2000.

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

16 16. “While some jurisdictions view public employees’ retirement rights as a gratuity,
17 California is firmly committed to the proposition that these rights are contractual; that they are
18 ‘vested’ in the sense that the lawmakers’ power to alter them after they have been earned is quite
19 limited.” (*Ibid.*) “By entering public service an employee obtains a vested contractual right to
20 earn a pension on terms substantially equivalent to those then offered by the employer.” (*Ibid.*)

21 17. “A long line of California decisions has settled the principles applicable to [this
22 situation]. A public employee’s pension constitutes an element of compensation, and *a vested*
23 *contractual right to pension benefits accrues upon acceptance of employment.* Such pension
24 right *may not be destroyed*, once vested, without impairing a contractual obligation of the
25 employing public entity.” (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863, italics
26 added.)

27 18. Prior to retirement:

28 “ “[a]n employee’s vested contractual pension rights may be modified . . . for the
purpose of keeping a pension system flexible to permit adjustments in accord with

1 changing conditions and at the same time maintain the integrity of the system.
2 [Citations.] Such modifications must be reasonable, and it is for the courts to
3 determine upon the facts of each case what constitutes a permissible change. To
4 be sustained as reasonable, alterations of employees' pension rights must bear
5 some material relation to the theory of a pension system and its successful
6 operation, *and changes in a pension plan which result in disadvantage to
7 employees should be accompanied by comparable new advantages.*” (Betts at p.
8 864, italics in original; accord, *Maffei v. Sacramento County Employees
9 Retirement System* (2002) 103 Cal.App.4th 993, 999-1000; *Board of
10 Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1132-1133; *Valdes v. Cory*
11 (1983) 139 Cal.App.3d 773, 783-784.)

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

14 20. “[The City] can make and enforce all ordinances and regulations regarding
15 municipal affairs subject only to the restrictions and limitations imposed by the City Charter, as
16 well as conflicting provisions in the United States and California Constitutions and preemptive
17 state law.” (*Ibid.*)

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

21 22. “The charter operates not as a grant of power, but as an instrument of limitation
22 and restriction on the exercise of power over all municipal affairs which the city is assumed to
23 possess” (*Grimm, supra*, at p. 38, quoting *City of Grass Valley* (1949) 34 Cal2d 595, 598-
24 599.)

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

29 24. On or about January 26, 2007, the City attempted to unilaterally change the
30 change the Earnings Code Document to exclude Motorcycle Care Pay and Canine Care Pay from
31 Base Compensation, and thereby exclude that portion of plaintiffs’ Base Compensation from the
32 calculations on which plaintiffs’ retirement allowances were or will be based.

33 25. Officer McElroy has already joined the City’s Deferred Retirement Option Plan,

1 set forth in San Diego Municipal Code section 24.1401, et seq., and his retirement allowance has
2 already been established, albeit incorrectly, because the City failed to include Motorcycle Care
3 Pay in his Base Compensation used to calculate his pension.

4 26. Officer Cookson has already joined the City's Deferred Retirement Option Plan,
5 set forth in San Diego Municipal Code section 24.1401, et seq., and his retirement allowance has
6 already been established, albeit incorrectly, because the City failed to include Canine Care Pay in
7 his Base Compensation used to calculate his pension.

8 27. Officers Thompson and Krouse have not yet retired or joined the City's Deferred
9 Retirement Option Plan, set forth in San Diego Municipal Code section 24.1401, et seq., and
10 their retirement allowances have not yet been established.

11 **CAUSE OF ACTION FOR WRIT OF MANDATE**

12 **(Against All Defendants)**

13 28. Plaintiffs incorporate by reference and reallege paragraphs 1 through 27 as though
14 fully set forth herein.

15 29. Pursuant to San Diego City Charter, article IX, section 141, et seq., and San Diego
16 Municipal Code section 24.0100, et seq., plaintiffs are or will be entitled to be paid a pension
17 according to the provisions of an existing pension plan.

18 30. The City's unilateral deletion of Motorcycle Care Pay and Canine Care Pay from
19 Earnings Codes included in Base Compensation was unlawful for various reasons, including that:

- 20 (a) the Court of Appeal held in *Sloan, et al. v. City of San Diego*, Case No. D049158,
21 that the inclusion of Canine Care Pay in prior versions of the Earnings Code
22 Document was not a mistake, and the City is barred by the doctrine of collateral
23 estoppel from re-litigating that identical issue;
- 24 (b) plaintiffs' pensions are a vested contractual right which may not be impaired by
25 any legislative action by the City;
- 26 (c) the deletions of Motorcycle Care Pay and Canine Care Pay from Earnings Codes
27 included in Base Compensation in the January 2007 Earnings Code Document
28 had nothing to do with the City's budget adoption process, and therefore these

1 changes were not authorized by San Diego Municipal Code section 24.0103¹; and
2 (d) there was no approval by a majority vote of the members of the City employees'
3 retirement system as required by San Diego City Charter, article IX, section 143.1.
4 Plaintiffs' pensions should have been or should be calculated according to the terms of an
5 existing pension plan.

6 31. Therefore, this Court should issue a peremptory writ of mandate (a) voiding the
7 City's unilateral amendment of the Earnings Code Document, (b) requiring the City to comply
8 with the terms of its existing pension plan, and (c) to take all necessary steps to correctly report
9 plaintiffs' Base Compensation to the San Diego City Employees' Retirement System.

10 32. There are no administrative remedies available to plaintiffs to compel the relief
11 sought herein. Therefore, plaintiffs, and each of them, have exhausted all available
12 administrative remedies.

13 33. Because plaintiffs seek an "order directing [the City] to comply with the terms of
14 [its p]ension [p]lan[.]" the Government Claims Act does not apply. (*Canova v. Trustees of*
15 *Imperial Irrigation District Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1498; *Board*
16 *of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1125-1126 [mandamus action to
17 enforce mandatory duty regarding future funding of retirement system was not one for money or
18 damages].)

19 34. To the extent the relief sought by plaintiffs "if granted, may ultimately result in
20 money being transferred between the [City and the San Diego City Employees Retirement
21 System], such relief does not render the request a claim for money or damages that requires the
22 filing of a government claim." (*Canova, supra*, 150 Cal.App.4th at p. 1498.)

23 35. The plaintiffs are seeking neither money nor damages by this first amended
24 complaint.

25 **WHEREFORE, plaintiffs pray that, following a duly noticed hearing, the Court:**
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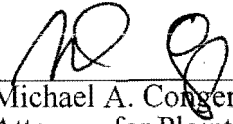
27 ¹ San Diego Municipal Code section 24.0103 states, in part: "The Earnings Codes
28 Document shall be amended annually, as necessary to reflect any changes or additions made during
the City's budget adoption process." (Italics added.)

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1. Issue a peremptory writ of mandate (a) voiding the City's unilateral amendment of the Earnings Code Document, (b) requiring the City to comply with the terms of its existing pension plan, and (c) to take all necessary steps to correctly report plaintiffs' Base Compensation to the San Diego City Employees' Retirement System;
2. Award plaintiffs costs of suit herein; and
3. Award such other and further relief as it deems necessary and proper.

Dated: September 28, 2009

LAW OFFICE OF MICHAEL A. CONGER

By: 

Michael A. Conger
Attorney for Plaintiffs