

**LAW & MOTION
DEPARTMENT 18
HONORABLE HELEN I. BENDIX**

Hearing Date: 2/10/09
Case Name: COUNTY OF ORANGE v. BOARD OF RETIREMENT
Case No.: BC389758
Motion: MOTION FOR JUDGMENT ON THE PLEADINGS.
Moving Party: DEFENDANT ASSOC. OF ORANGE COUNTY DEPUTY
SHERIFFS ("AOCDS"); JOINDER OF DEFENDANT BOARD OF
RETIREMENT OF THE ORANGE COUNTY EMPLOYEES'
RETIREMENT SYSTEM ("OCERS")
Opposing Party: PLAINTIFF.
Action Filed: 2/1/08

Tentative Ruling

Plaintiff alleges two causes of action each seeking declaratory and injunctive relief directed at declaring certain alleged retroactive retirement benefits as unconstitutional under Article XVI, section 18(a) (re: debt limit in the 1st Cause of Action) and Article XI, section 10 (a) (re: extra compensation in the 2nd Cause of Action), respectfully, and seeking to enjoin defendant OCERS from "collecting further contributions to fund the retroactive portion of the '3% at 50' benefit enhancement" and "continuing to pay that portion of the '3% at 50' to any retired County employee or their beneficiary, designee, spouse, ex-spouse or any other person[.]" First Amended Complaint ("FAC"), Paragraph 104 and Prayer for Relief at p. 22.

The County alleges that under the 3% at 50 pension benefit at issue here, an employee's retirement benefit is 3% of annual compensation multiplied by the number of years of service for members who retired at age 50 or over. To the extent that an employee retires before he or she is 50, the amount is reduced by a legislatively prescribed age factor. See FAC, Paragraphs 56, 57; Exhibit C (the Towers Perrin Analysis), at p. 5.

As to the 1st Cause of Action, plaintiff alleges that in 2001, its Board of Supervisors approved the 3% at 50 increase in pension benefit for current employees for past service that had been subject to a 2% at 50 formula at the time the services were rendered, without seeking approval from the electorate as required by Article XVI, Section 18(a) even though the Board knew based on the Towers Perrin Report that (1)the actuarial cost of that benefit in 2001 was approximately \$99-\$100 million; (2) the benefit was retroactive to the extent it is calculated, in part, based on past services rendered; (3) that employee contributions to OCERS did not cover that increased cost; and (4) monies from the general

fund in future years would have to cover that cost of the benefit. See FAC, Paragraphs 64-71. Plaintiff further alleges based on the 2007 Segal Report, that the current cost of the "retroactive past service benefit" is \$187 million. Id. at Paragraph 84.

As to the 2nd Cause of Action, plaintiff County acknowledges that Article XI, section 10(a) has been interpreted by the courts not to bar local governments from increasing pension benefits to "former" public employees, including former employees who are retired and already drawing public pensions. FAC, Paragraph 39. Plaintiff alleges that it is only challenging the constitutionality of the 3% at 50 benefit as it applies to "current" employees. Id. at Paragraphs 39-40.

In its Opposition, plaintiff further refines its contention: "The County does not dispute that many AOCDS members are entitled to a pension for services rendered before June 28, 2002, under the 2%@ 50 formula and to an increased pension under the 3% at 50 formula for services rendered after June 28, 2002. The issue presented here is whether, consistent with Article XI, section 10, the enhanced 3% @50 formula may be applied retroactively to grant current employees extra unearned (deferred) compensation for services rendered before the enhanced formula went into effect." Opposition p. 11.

Plaintiff contends that the benefit violates Article XI, section 10(a) because it is extra compensation not authorized by any statute or agreement in effect "at the time the relevant work was performed by members of AOCDS and other County employees" entitled to the benefit. FAC, Paragraph 101.

AOCDS filed a Complaint-in Intervention pursuant to stipulation of the parties, in which it opposes plaintiff's constitutional challenges to these retirement benefits. See Stipulation, filed on 3/3/24/08.

AOCDS (joined by OCERS) moves for judgment on the pleadings. As to First Cause of Action based on Article XVI, section 18(a), AOCDS argues that the unfunded accrued actuarial liability ("UAAL") of OCERS does not affect the debt limitation imposed on the County by Article XVI, section 18(a). Motion, p. 2.

Specifically, AOCDS relies on Opinion # 82-405 (sometimes referred to as the "Opinion"), in which in 1982, Attorney General Deukmajian opined that the debt limit provisions in Article XVI, section 1 of the California Constitution do not apply to CALPERS retirement benefits where the purported unfunded liability or past service liability are actuarial projections. Motion, pp. 7-8. Defendant further argues that the County has admitted that that the purported unfunded debt here is based on the kind of actuarial projections described in the latter Opinion. See Request for Judicial Notice, Exhibit 16. Motion, p. 11.

AOCDS also relies on Rider v. City of San Diego (1998) 18 Cal. 4th 1035, for the

proposition that Article XVI, section 18(a) applies only to a local government's obligations "during the relevant fiscal year" and that constitutional debt limitations do not "arbitrarily telescope multi-year obligations into a single year." Motion, p. 8 (internal quotation marks omitted).

As to the Second Cause of Action, AOCDS contends that the purpose of Article XI, section 10 (a) was to prevent the Legislature from making direct appropriations to individuals for moral or charitable reasons. AOCDS cites Jarvis v. Cory (1980) 28 Cal. 3d 562, 577, for this proposition.

AOCDS also contends that the 3% at 50 benefits at issue here is a vested public employee pension benefit for which an employee's continued employment is consideration, and that public California employees are entitled to any future increase in benefits even if the benefit is based on past service. AOCDS cites, among other cases, Sweesy v. Los Angeles County Peace Officers' Retirement Board (1941) 17 Cal. 2d 356, 359, for this assertion. Motion, p. 13. Given that plaintiff alleges that under the amended Memorandum of Understanding (the "amended MOU"), the 3% at 50 benefit applies only to current and newly hired deputy sheriff members of AOCDS and certain other County employees retiring on or after 6/28/02 (FAC, Paragraph 67), the extra compensation constitutional prohibition is not applicable. Motion, p. 14 (citing also American River Fire Protection Dist. V. Brennan (1997) 58 Cal. App. 4th 20, 27-28 and Nelson v. City of Los Angeles (1971) 21 Cal. App. 3d 916, 918.

Defendant AOCDS further contends that the amended MOU recites a valid public purpose, to wit, to retain public safety officers in a competitive market, and that compensation for past service does not constitute extra compensation or a gift of public funds. If the back salary negotiations in San Joaquin Employees' Association, Inc. v. County of San Joaquin (1974) 39 Cal. App. 3d 83, and the salary payments in Jarvis, supra, did not constitute extra compensation, albeit they were calculated on past service, a fortiori, the 3% at 50 pension benefit pled in the FAC is not extra compensation prohibited by Article XI, section 10(a). Motion, pp. 14-15.

Finally, the County's admission in the FAC that it is not unconstitutional to award former employees pension benefits based upon past service, but it is unconstitutional when the employee still works for the County is an absurd distinction that has no antecedent in case law. Reply, pp. 7-8.

The plaintiff County retorts as follows:

1. As to the 1st Cause of Action, the plain language of Article XVI, section 18(a) proscribes creating a \$100-\$300 million long-term pension liability without obtaining approval from the electorate. Opposition, p. 2. AOCDS' arguments violate the purpose of

Article XVI, Section 18(a), which is to promote governmental transparency and accountability. The County cites to its own allegation at FAC, Paragraph 30, for this proposition. Opposition, pp. 2-3.

The County cites dictionary definitions of the term "incur" or "incurred" to argue that just because the precise amount of the debt cannot be determined, the County incurred an indebtedness when it signed the amended MOU without obtaining the requisite approval from the electorate. Opposition, p. 5. AOCDS' authorities, moreover, are non-binding, to wit, the 25 year old Opinion and out- of- state cases interpreting other states' constitutions, and are not factually on point. Opposition, pp. 5-7. As to the Opinion, in particular, plaintiff argues that it addresses merely changes projected by actuaries as to the cost of a pre-existing liability and not the incurring a new liability where the County knew that its cost exceeded employee contributions toward pension liabilities. Id. at p. 6.

Finally, to the extent that AOCDS argues that revenues exceeded costs in the 2001-2002 time-frame, this "fact" is in dispute and not subject to resolution upon a motion for judgment on the pleadings. Id.

2. As to the 2nd Cause of Action, the County relies on the plain language of Article XI, section 17, to argue that compensating a current employee for past services is constitutionally prohibited. Opposition, pp. 8-9 (citing Longshore v. County of Ventura (1979) 25 Cal. 3d 14, 22-23).

The benefits here are unconstitutional for the same reasons that retroactive payment of overtime under a different formula than that in effect when the overtime was incurred has been held to be unconstitutional. The County cites, among other cases, Ventura, supra, and Seymour v. Christiansen, 235 Cal. App. 3d 1168, 1178-79 (regarding vacation pay) for this assertion. Opposition, pp. 9-10.

Deeming the pension benefits here "vested" does not confer any right when the benefits were not constitutional in the first place. Opposition, p. 10 (citing Medina v. Bd. of Ret. , L.A. County Emps. Ret. Ass'n (2003) 112 Cal. App. 4th 864).

The County distinguishes Nelson on the grounds that it involved former and not current employees and Brennan on the ground that it involved unused sick pay. Opposition, pp. 12-13. The County distinguishes San Joaquin on the basis that unlike there, here the formula for the pension benefits was not undetermined at the time the County approved the retroactive benefit at issue here because the 2% at 50 formula applied. Opposition, p. 14.

Finally, plaintiff argues that AOCDS' argument produces the absurd result that although a former employee as of 6/28/02, may have worked during the same past time period as a current employee as of 6/28/02, that former employee would receive far less in pension benefits-- albeit, the County was a signatory to an agreement that created that

purported dichotomy. Opposition, pp. 14-15.

The Merits

First Cause of Action Under Article XVI, section 18(a)

Article XVI, section 18(a) provides, in pertinent part, that "[n]o county ... shall incur any indebtedness or liability in any manner or for any purpose *exceeding in any year* the income and revenue *provided for such year*, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose" (Emphasis added.)

Plaintiff does not allege that the \$99 million projected estimate of the payout attributable to the 3% at 50 benefit at the time the County's Board approved the benefit had to be paid in 2002. Nor does the County plead that the \$187 million updated estimate in the Segal Report had to be paid as of the date of that report, to wit, in 2007.

The County does not allege that payments in any given year for the 3% at 50 benefit will cause the County to exceed the County's revenues for any such year. The express language of Section 18(a), however, requires indebtedness and revenue to be balanced in reference to "such year" or in "any year." The express language of the Constitutional provision references indebtedness or liability "exceeding in any year" income and revenue "provided for such year."

In Rider, the Supreme Court described Section 18(a) as mandating a balanced budget " and described the indebtedness" referenced in Section 18(a) as "all obligations of the local government *during the relevant fiscal year*." 18 Cal. 4th at p. 1045 (emphasis added). In Rider, in discussing prior Supreme Court authority, the Court explained that just because a lease provides for lease payments over time, the full value of the aggregate of those lease payments does not constitute an "indebtedness" for purposes of Section 18(a) in the year the local government signed the lease:

" '[I]f the lease or other agreement is entered into in good faith and creates *no immediate indebtedness for the aggregate* installments therein provided for but, on the contrary, confines liability to each installment as it falls due *and each year's payment is for the consideration actually furnished that year*, no violence is done to the constitutional provision. [Citations.]....'"

Id. at p. 1048 (Emphasis in the original; quoting Dean v. Kuchel (1950) 35 Cal. 2d 444, 446-447).

The County does not appear to contest AOCD's case authority that continued employment can be consideration for a promise to pay a pension. The County has repeatedly asserted that it is forging the instant constitutional challenge to the 3% at 50 benefits "as-applied" to *current* employees and then only to the extent that the benefit is measured, in part, by years of past service. See Opposition, 11.

The court grants the motion with leave to amend to the extent the County can allege that its liability for that portion of the 3% at 50 pension benefit attributable to past service as of 6/28/02 caused its indebtedness to exceed revenue in any given year since 6/28/02.

Second Cause of Action Under Article XI, Section § 10

Section 10(a) of Article XI provides, in pertinent part, that "[a] local government body may not grant extra compensation or extra allowance to a ... public employee ... after service has been rendered or a contract has been entered into and performed in whole or in part, or pay a claim under an agreement made without authority of law."

In American River Fire, *supra*, appellate court observed that the extra compensation clause does not apply to pension benefits:

"If this creates an anomaly in the law, it is one sanctioned by the California Supreme Court." (*United Firefighters of Los Angeles v. City of Los Angeles* (1989) 210 Cal. App. 3d 1095,1105....The right to pension benefits vests upon the acceptance of employment. (*Miller v. State of California, supra*, 18 Cal. 3d at p. 815.) An increase in pension benefits even after retirement is not extra compensation as the term is used in article XI, section 10 of the California Constitution. (*Nelson v. City of Los Angeles* (1971) 21 Cal. App. 3d 916, 918. In *Nelson*, the city increased pension benefits for police officers from \$250 a month to \$300 a month. Retired officers and an officer's widow sought the increased pension benefit; the city refused on the grounds it would violate the extra compensation clause. The court found no violation. The rationale for this rule is 'that an increase in pension benefits payable to a retired public employee or his widow on pensionable status is paid as a result of rights incident to that status and not as a matter of increased compensation or allowance.' (*Id.* at p. 919).

58 Cal. App. 4th at p. 28.

The County's efforts to avoid the dictates of American River and Nelson are not persuasive.

First, the County has no support for an interpretation of Article XI, section 17 other than itself, that would turn on whether one is a current, as opposed to retired employee. More specifically, it merely argues that as a matter of policy, this interpretation makes sense because current employees can exert more pressure by striking in order to "encourage local officials to provide retroactive, unearned benefits...." FAC, Paragraph 40. Cf. Sweesy, supra, 17 Cal. 2d at p. 361 (in rejecting a constitutional challenge to retirement benefits for a widow of a retired peace officer which benefits went into effect after the officer retired, the court noted "[n]o distinction is made by the legislature between members in active duty on full pay and those on retirement, in so far as the retroactive provisions are concerned....").

Second, to the extent that the County argues that pension benefits should be treated like overtime payments or sick pay, as set forth in above-quoted excerpt, the American River court relied on Supreme Court authority to reject that contention no matter how anomalous the purported disparate treatment may be.

Third, the court respectfully submits, that if the County is concerned that a pension benefit is unearned because it is based, in part, on past service, that concern does not evaporate because the employee is retired at the time his or her benefit is increased. See Reply, pp. 7-8. Thus, the distinction is not logical.

The motion is granted without leave to amend as to the 2nd Cause of Action.

Amicus Curiae

In its discretion, the court considers the briefs of the California Public Employees' Retirement System (CalPERS) for purposes of the instant motion only. The court expresses no opinion on whether it will accept amicus briefs from CALPERS if there were to be future proceedings in this case in this court.

Judicial Notice

For purposes of ruling on the instant motion, the court has considered only the allegations in the FAC and the exhibits attached to the FAC.

Disposition

The motion is granted without leave as to the 2nd Cause of Action and with leave as to the 1st Cause of Action. Plaintiff is ordered to file and serve its amended complaint within 30 days of AOCDS' notice of today's ruling.