

**Pension Fund Condition – March 6, 2007**  
*By Ann Smith, MEA Attorney, with forward by Joe Flynn*

Retirees:

The attached message makes the same point, perhaps more powerfully, that David Wescoe, SDCERS Administrator, made in his memo to Councilmember Toni Atkins. Ann Smith represents the MEA in the City Attorney's benefit litigation case before Judge Barton.

*Joe Flynn, Retiree Rep. to the Board*

**Subject:** City Tells Federal Court: Pension Fund Is Actuarially Sound and "Benefits For Funding Relief" Is Consistent With California Pension Law

Dear ALL:

As you know, the San Diego Police Officers Association has a lawsuit pending in federal court related to the City's underfunding of the pension plan. The City is represented by outside counsel, Latham & Watkins.

The City filed a Motion for Partial Summary Judgment in the case on February 12, 2007. In this Motion, **the City presented District Court Judge Marilyn L. Huff** with a number of "undisputed facts" and citation of case law supporting the City's position that the POA's claims are not meritorious. You will find this interesting reading - especially when contrasted to the wild, polar-opposite rhetoric offered to State Court Judge Jeffrey Barton over the past few months by the City Attorney on behalf of the same client - the City of San Diego.

**Here is what the City filed, in pertinent part:**

A pension system thus is actuarially sound for constitutional purposes if it is reasonably capable of paying all benefits presently owed, even if through express mitigating measures. *Wilson*, 52 Cal.App.4<sup>th</sup> at 1136 (suggesting that temporary mitigation of employer contributions would not violate the state contract clause when accompanied by "express provision for [subsequent] mitigation through increased employer contributions"); see *also* Op. Cal. Atty. Gen. 06-808, 2006 WL 3694844 (Dec. 1, 2006)(pension system is not rendered actuarially unsound by retirement board decision to extend the amortization period for payment of benefits beyond the average remaining work period of the members eligible to receive the benefits).

Further, a pension system does not impair constitutional contract rights when changes in the level of pension funding are accompanied by comparable new advantages, *i.e.*, new benefits. [fn. 10: While the sensibility of this doctrine - which permits a simultaneous decrease in funding and increase in benefits - is perhaps questionable, **it remains an accurate statement of California law**. See *Wilson*, 52 Cal. App. 4<sup>th</sup> at 1145 (holding that any modifications to a pension system are valid if accompanied by an offsetting comparable new advantage to employees, including changes to the payment of employer

contributions); see also *Claypool v. Wilson*, 4 Cal. App.4<sup>th</sup> 646, 665-66 (1992)("The saving of public employer money is not an illicit purpose if changes in the pension program are accompanied by comparable new advantages to the employee.")] The California Court of Appeal recently explained this principle, noting (albeit not in the context of an alleged contract clause violation), that the mere existence of an unfunded liability ("unfunded actuarial accrued liability or "UAAL") does not render a pension system actuarially unsound:

*A decision that increases UAAL is not necessarily bad for members.* As the actuary's June 30, 2002

valuation makes clear, the primary cause of the increase in UAAL in the Association's pension fund in

2002 was an increase in pension benefits valued at approximately \$1.1 billion. Obviously, such benefit

increases do not harm members. *If the Board were prohibited from increasing UAAL, such benefit*

*increases may not have been granted, since the County might have determined that such increases were*

*Unaffordable.* As the Association's actuary noted in his June 30, 2002 actuarial valuation in defining UAAL:

"Most retirement systems have UAAL. They arise each time new benefits are added and each time an

actuarial loss is realized. *The existence of UAAL is not in itself bad, any more than a mortgage on a house*

*is bad. UAAL does not represent a debt that is payable today.*

*Bandt v. Bd. Of Retirement, San Diego County Employees' Retirement Sys.*, 136 Cal.App.4<sup>th</sup> 140, 157 (2006)(emphasis added).

.The undisputed evidence shows that the SDPOA has no claim. The funding component of MP2 did not render the pension system actuarially unsound to such a degree that any benefits to which SDCERS beneficiaries lawfully are entitled are in danger of going unpaid. (Testimony of J. Esuchanko - City's "independent actuary")(stating that in the absence of significant adverse effects, so long as the unfunded liability is properly amortized and paid, SDCERS will be able to continue paying City employees' retirement benefits into the future). The undisputed evidence further establishes that the *total* amount of underfunding attributable to the City contribution rate stabilization plan contained in *both* MP1 and MP2 is less than \$150 million. Such a relatively small amount could not in and of itself render SDCERS actuarially unsound - and, indeed, it already has been rectified in the *McGuigan* settlement.

Moreover, the SDCERS actuary recently has concluded that SDCERS is able to pay all current beneficiaries, and is capable of servicing planned pension obligation debt to cover any presently accrued liabilities. Remarkably, as of June 30, 2006, the SDCERS funding ratio reportedly is 79.9%, a funding level which is *well-above* the "at-risk" funding ratio guidelines contained in the recently enacted Pension Protection Act of 2005. See 26 U.S.C. section

430(i). Thus, as a matter of federal law, by its own accounting, SDCERS presumptively is not actuarially-unsound, and most importantly for constitutional purposes, fully capable of paying benefits when due.

*So wrote the City of San Diego* with the intention that its position be relied upon by a sitting federal judge. Moreover, the City represented to the court that the facts it recites in support of its legal argument are "undisputed." Both the Business & Professions Code section 6068(d) and the California Rules of Professional Conduct Rule 5-200 impose on all licensed attorneys the obligation *never to seek to mislead a judicial officer*. The attorneys representing the City in this federal court action undoubtedly take that responsibility very seriously on behalf of the City as their client and on their own behalf as licensed professionals.

As you likely know - in stark contrast to the above -- City Attorney Mike Aguirre (claiming to represent the *same client City of San Diego*) has repeatedly represented to the *state court* that the pension plan is actuarially unsound, and that seeking relief by the elimination of the pension benefits you have paid for and earned with your labor is the "last way station on the road to bankruptcy."

More later - I am reaching for my dictionary to re-read the definition of ethical. Best regards, Ann Smith