



JAN I. GOLDSMITH
SAN DIEGO CITY ATTORNEY

January 25, 2011

Via Facsimile Transmission
and U.S. Mail

Ann M. Smith, Esq.
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Dear Ms. Smith:

Thank you for your letter of January 21, 2011. We are authorized by the City Council to send this responding letter on behalf of the City.

As you know, six months ago the City won a final judgment which contains an order precluding SDCERS from requiring the City to pay the underfunding costs. This underscores the importance of attempting to resolve pension problems and legal issues before Court decisions. It also underscores the wisdom of MEA's decision to participate with us in that effort. We hope all labor organizations join in this effort.

With regard to this matter, SDCERS has plenary authority to administer the pension system and, therefore, much of the discussion should be had with SDCERS. We cannot and will not assume SDCERS' obligations to administer the plan according to the law. There are some areas, however, in which the City is willing to provide input and be helpful without assuming SDCERS' obligations or waiving its rights.

Although we generally agree with your stated objectives, we must add two additional objectives which we believe were implicit in your proposal, but should be clearly stated. We must enforce the terms of the Court's judgment and we must comply with the law, including the City Charter.

There are, at least, three legal limits on what can be done. First, whatever is done must comply with the Court's judgment. Second, it must not constitute a gift of public funds or an increased "benefit" under the pension plan thereby triggering the need for voter and employee votes under Charter section 143.1. Third, it must be consistent with SDCERS' fiduciary duty to members of the plan and the City. The policy decisions of what the City should and should not do are within the purview of the Mayor and City Council.

Due to the first and second legal limitations, the City may not simply agree to assume obligations and cover the cost of undercharged service credits for the 2200 individuals affected by this judgment. That broad brush approach would likely constitute an increased benefit and gift of public funds. The cost would add to the City's annual structural deficit.

However, we could find some common ground by breaking out the categories of individuals into differing circumstances. We will also address your view that the City is indirectly responsible by virtue of SDCERS and trustees' possible liability.

A. CATEGORIES OF AFFECTED EMPLOYEES

1. Those who were in DROP on November 20, 2007.

As you point out, the City's petition and the judgment did not apply to individuals who were retired as of November 20, 2007. You are correct in asserting that there were employees who were already in the DROP program at that time and the terms of DROP precluded them from leaving the program. What's more, DROP requires termination of their employment after five years. As a result, on November 20, 2007, these individuals were "trapped" in DROP and could not correct the service credit problem by leaving the program and resuming normal employment.

The petition and judgment are silent as to whether these individuals are included in the judgment (as normal employees) or excluded (as retirees). We agree with you that the judgment should be clarified, but that decision lies with the judge who rendered the judgment. Based upon your request, we have discussed with SDCERS the procedure for approaching Judge Nevitt with a clarification. It is my understanding that SDCERS will file a motion requesting that clarification.

2. Those who entered DROP after November 20, 2007.

Those who entered DROP after November 20, 2007, are clearly covered by the existing judgment. In past cases, SDCERS has exercised some discretion in rescinding a DROP contract, making the City whole as if the employee had not entered DROP and asking the City whether it will allow the employee to continue working outside of DROP.

Under case law, SDCERS may do so only in limited circumstances. What's more, the decision on whether to allow an employee to continue working outside of DROP is left to the executive branch of the City's government, not SDCERS or our office. Notwithstanding the limitations, this process has the potential to offer some possible resolutions that do not result in the City incurring the cost of undercharges, but allows DROP participants to get credit for their time of employment.

Although the above offers SDCERS some discretion, we cannot agree that the City waived its rights by signing off on DROP contracts. Waiver is a knowing and intelligent relinquishment of a known right. SDCERS decides an employee's eligibility for DROP, not the City. How could the City possibly waive anything when it is simply informed that an individual is eligible and not that an individual illegally purchased service credits?

Finally, employees enter DROP completely at their own risk. We ask you to review the enclosed copy of the DROP contract form. The employee is urged to seek legal advice with regard to any questions. The employee signs a complete release of all known and unknown claims as against the City and SDCERS. That very release was enforced on January 10, 2011, by Judge Pressman in dismissing *Bowlin v. City of San Diego*.

3. Those who were not aware of the issue.

According to your letter, there are affected individuals who state today that they were not aware of the issue or lawsuit before they took action to retire or enter DROP after November 20, 2007. Had they known, they would not have taken those actions.

Given the amount of publicity concerning this issue over the years, it is hard to imagine that there were individuals who were unaware. Back in October 2007, you were quoted by the Union Tribune eloquently explaining how employees were very concerned about this issue. You were quoted as telling SDCERS: "You should tell them today, they should not worry anymore."

The issue was not only prominent in the media, we are told it was openly discussed and communicated to employees by labor organizations and attorneys. SDCERS contends that it provided appropriate notifications. This issue and the lawsuit were common knowledge.

As for the City providing notice to employees, we remind you that an unfair labor practice charge was filed against the City - which the City lost - based upon Mr. Aguirre's comments to employees urging them to return the undercharged service credits. Not only did the City have no legal duty to provide formal notice to employees, attempts to do so were deemed an unfair labor practice.

4. Current employees.

There are approximately 1500 current employees who are affected by the judgment. You have suggested that SDCERS allow these individuals to pay the difference between the true cost and undercharged cost without the 7 years of interest that would otherwise be due.

There are a number of questions we would have on this. First, how much would be added to the unfunded liability by virtue of waiving interest? Second, what is the legal basis for doing so? Third, why should current unaffected employees and the City be forced to absorb this interest through an increase to their own contributions? Wouldn't this simply be a windfall to people who were not entitled to what they received? After all, these service credit purchase agreements were found by the Court to be illegal under the San Diego City Charter.

At this point, the City does not see a basis for covering the interest charges or having other employees through their contributions do so.

B. CITY'S INDIRECT LIABILITY

Your letter contends that SDCERS and, perhaps, its trustees are liable to employees and retirees for failing to disclose the issue and the "material risk their 'window period' service credits might be lost or reduced as a result of contentions the City was making in ongoing litigation."

As to litigation against SDCERS' trustees, you are correct that they are deemed employees of the City and the City must comply with Government Code section 995 et.al. Regardless of our disagreement with some of their decisions, we recognize the City's obligations.

What's more, these individuals are volunteers and we need to be able to attract qualified participants in the future. They must feel free to exercise their independent judgment. We don't see a legitimate claim against these individuals. A lawsuit aimed at them would be ill-advised.

As to actions of City appointees on the SDCERS board, any City liability for those actions would be the same as a governor being held legally responsible for the decisions of his judicial appointees. There is no legal basis for that occurring.

There may or may not be claims against SDCERS, just as there may or may not be claims against lawyers involved, labor organizations and others who were in a position to advise individual employees or the entities. Our office does not represent any of those parties and we do not have sufficient evidence upon which to fully assess liabilities, if any.

If SDCERS is held responsible for improper conduct, it is certainly possible that the City and our current employees may ultimately incur costs through increased contributions. Although, at this point, we don't know the likelihood of that occurring we do note that SDCERS contends there was proper notice. What's more, please note that the general release contained in the DROP contracts extends to SDCERS.

CONCLUSION

SDCERS has plenary authority to administer the pension system and, therefore, much of the discussion should be had with SDCERS. We cannot and will not assume SDCERS' obligations to administer the plan according to the law. There are some areas, however, in which the City is willing to provide input and be helpful without assuming SDCERS' obligations or waiving its rights.

Although we generally agree with your stated objectives, we must add two additional objectives which we believe were implicit in your proposal, but should be clearly stated - we must enforce the terms of the Court's judgment and we must comply with the law, including the City Charter.

The City may not simply agree to assume obligations and cover the cost of undercharged service credits for the 2200 individuals affected by this judgment. That broad brush approach would likely constitute an improper increased pension benefit and gift of public funds, giving an unlawful windfall to many individuals.

However, we find some common ground by breaking down the categories of individuals into differing circumstances, specifically those who were in the DROP program on the date the petition was filed, November 20, 2007. What's more, SDCERS does have certain limited discretionary options that could help resolve some of the issues without increasing the City's costs.

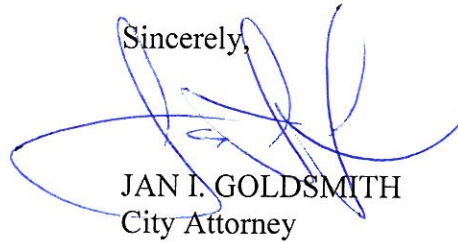
As for "indirect" responsibility, we honor our obligations under the Government Code to individual trustees. We don't see a basis, however, for liability. There may or may not be claims

against SDCERS, just as there may or may not be claims against lawyers involved, labor organizations and others who were in a position to advise individual employees or the entities. Our office does not represent any of those parties and we do not have sufficient evidence upon which to fully assess liabilities, if any. We do note, however, that SDCERS contends there was proper notice. What's more, this issue was common knowledge among the general public and employees.

Finally, employees enter DROP completely at their own risk. We ask you to review the enclosed copy of the DROP contract form. The employee is urged to seek legal advice with regard to any questions. The employee signs a complete release of all known and unknown claims as against the City and SDCERS. That very release was enforced on January 10, 2011, by Judge Pressman in dismissing *Bowlin v. City of San Diego*.

Again, thank you for your letter.

Sincerely,



JAN I. GOLDSMITH
City Attorney

JG:cbs

Enclosure

cc: Honorable Mayor
Honorable City Council members
Jay Goldstone, Chief Operating Officer
Andrea Tevlin, Independent Budget Analyst
Elaine W. Reagan, SDCERS General Counsel
Mark A. Hovey, Chief Executive Officer

DEFERRED RETIREMENT OPTION PLAN (DROP)

ELECTION TO PARTICIPATE IN DROP AND AGREEMENT TO TERMINATE EMPLOYMENT

Introduction

If you are an active member of the San Diego City Employees' Retirement System ("Retirement System"), and you are currently eligible for a service retirement, you may participate in DROP. DROP provides access to a lump sum benefit in addition to your normal monthly retirement allowance.

If you elect to participate in DROP, you must designate the amount of time you wish to participate. This period may not exceed 60 consecutive months. You must also agree to leave your employment with the City, Port District or Airport Authority at the end of your designated period.

Once you enter DROP, you will not be able to change your election to participate in DROP or your agreement to leave employment and retire, regardless of what happens between now and your retirement date. For example, if you elect to participate in DROP and your family circumstances change such that you would rather continue working, you still must retire at the end of your designated DROP period. Also, if any benefit improvements occur between the time you enter DROP and the date you retire, you will not be eligible for these improvements.

This Agreement is designed to help you think through your decision to participate in DROP. **You should consider this decision very carefully.** This Agreement asks you specific questions to assure the Retirement Administrator and the Retirement Board that you have, in fact, carefully considered your decision to participate in DROP, and that you understand the consequences of your decision. In fact, your decision is so important that you will have 7 calendar days to reconsider your election to participate in DROP after you sign it.

Please take these questions and this Agreement very seriously. If anything is unclear, do not complete this Agreement without first speaking to Retirement System staff for clarification.

Your Statements to the Retirement System and Your Employer (the City, Port District or Airport Authority)

The Retirement System and your employer will rely on the following facts. Each is important because it demonstrates you have carefully considered your election to participate in DROP.

Please initial each statement in the place shown in the left margin.

- _____ I have received a copy of the terms and conditions for participating in DROP. (For City employees, the terms and conditions are contained in Chapter 2, Article 4, Division 14 of the San Diego Municipal Code. For Port District or Airport Authority employees, they are contained in the separate retirement plan of each agency).
- _____ I have not been pressured, coerced, intimidated or threatened by the Retirement System or my employer, or by any of their agents, in connection with my decision to participate in DROP.
- _____ I have had enough time to consider my options regarding my employment with my present employer (the City, Port District or Airport Authority).
- _____ I understand that I must leave my present employment with the City, Port District or Airport Authority, and retire, by the end of my designated DROP participation period.
- _____ I understand that the longest I may participate in DROP is 60 consecutive months.
- _____ I understand that, before I enter DROP, I must elect to receive either the maximum benefit or one of the retirement settlement options, and that I will not be able to change this election once I enter DROP.
- _____ I understand that, before I enter DROP, I must designate my beneficiary for the continuance payable upon my death, if any, and that I will not be able to change this designation once I enter DROP.
- _____ I understand that if benefits are improved or otherwise changed after I enter DROP, through meet and confer or any other process, I will not be eligible for any of these benefit improvements or changes.
- _____ I understand that my decision to participate in DROP has very important consequences for me. I have been advised to consult Retirement Staff or an advisor, such as an accountant or an attorney of my choosing, if I have any questions about participating in DROP.
- _____ I understand that I am legally bound by this Agreement. I have been advised to consult an attorney of my choosing if I have any questions about this Agreement.

_____ I understand that I may revoke this Agreement within 7 calendar days of signing it by giving a written notice of revocation to the Retirement Administrator. If I do not give the Retirement Administrator written notice of revocation within this 7-day period, this Agreement will be final and binding upon me.

Your Promises To Your Employer

Please initial each of these promises:

_____ I elect to participate in DROP.

_____ I designate _____ through _____ as my DROP participation period. (The DROP designation period may not exceed 60 consecutive months.)

_____ I will retire under the Retirement System and end my employment with my present employer (the City, Port District or Airport Authority) no later than the end of the DROP participation period I have designated.

_____ I will abide by the terms and conditions of DROP, as specified in: (1) my employer's retirement plan and (2) the Rules established by the Retirement Board.

Waiver

_____ I release the Retirement Board and my employer _____ (name of employer) from any and all claims based upon my decision to participate in DROP and my agreement to retire and leave City employment at the end of my DROP participation period.

_____ I release the Retirement Board and my employer _____ (name of employer) from any and all claims under the California and federal age discrimination in employment laws arising from my agreement to retire at the end of my DROP participation period.

_____ I expressly waive all rights under section 1542 of the California Civil Code and any similar law of any State or Territory of the United States. Section 1542 reads as follows:

§ 1542. Extent of General Release

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

Covenant Not To Sue

_____ I will not sue the Retirement Board or my employer _____
(name of employer) or any of their employees, officers or agents, for any
claim arising out of my decision to participate in DROP, my participation in
DROP or my decision to retire and leave employment at the end of my
DROP participation period.

Your Signature To This Agreement

Please initial each of these statements.

_____ I have carefully read this entire Agreement.

_____ I understand this Agreement.

_____ I am satisfied with this Agreement.

_____ I have signed this Agreement voluntarily.

_____ This is the only Agreement I have made with the Retirement Board or my
employer regarding my election to participate in DROP, my employment
while I am participating in DROP or my agreement to retire and leave my
present employment at the end of my DROP participation period.

Dated: _____

Member's Name (Print)

Member's Social Security Number

Member's Signature

EMPLOYER (City, Port District or Airport
Authority)

Dated: _____

BY: _____

BOARD OF ADMINISTRATION

Dated: _____

BY: _____

Retirement Administrator

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