



JAN I. GOLDSMITH
SAN DIEGO CITY ATTORNEY

September 12, 2011

Via U.S. Mail and
Electronic Mail

Ann M. Smith, Esq.
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Response to MEA's Demand to Meet and Confer Re "Pension Reform" Ballot Initiative

Dear Ms. Smith:

This will acknowledge receipt of your September 9 letter. Deputy City Attorney Joan Dawson will provide a response as to some of your claims. This letter is directed to the portion of your letter that seeks to politicize the legal issues and legal work of our office. With all due respect, I have four points in response:

First, I have not relinquished my First Amendment right to speak out on public policy issues. I have repeatedly used discretion in doing so, but I won't give up my basic right as it is a personal right I enjoy as an American. I did briefly speak out on this issue, but I have not been involved in any campaign effort. That is not a legal limitation; it was a self-imposed limitation based upon my own discretion.

Second, your letter implies (but does not allege) that I opined as to the legality of the initiative. I have not. Our office has opined regarding "pensionable pay" which is an element of the initiative. Please see our legal opinion on our website that can be found at www.sandiego.gov/cityattorney/documents/index.shtml.

However, our office has not opined as to the legality of the pension initiative. I doubt we will do so. We do provide such opinions regarding council-initiated propositions, but rarely do so with regard to citizen initiatives.

As a side note, I have not personally opined as to the legality of the initiative. As I understand it, the initiative was written by a team of lawyers that included former City Attorney John Witt. I would refer you to those attorneys as I have not, and likely will not analyze the legality of its terms.

In fact, you even confirmed this point. You wrote that a private fund-raising committee “used the funds raised to hire attorneys to research and write” the initiative.

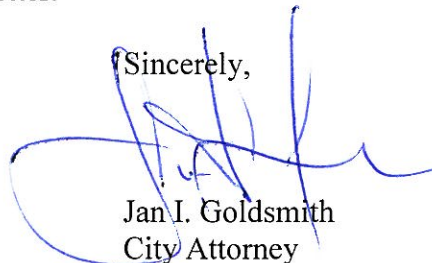
Third, on pages 3 and 4 you are somehow trying to make our legal work into partisan Republican/Democratic. In truth, I don’t even know the political affiliation of the attorney who researched this. Three out of four of our top Assistant City Attorneys are Democrats and I couldn’t care less. They are terrific lawyers. Your effort to somehow make this into something partisan is wrong.

There is no case in the history of this state requiring “meet and confer” on a citizens’ initiative before being placed on the ballot. If such an initiative qualifies for the ballot, the voters decide the matter, not the City. If it is adopted, there could be “meet and confer” regarding impacts.

Fourth, you contend that much of the City Council has been excluded from input on pension reform. You ignore the facts. To remind you, enclosed is my letter to you and all labor organizations dated January 13, 2011, offering to open discussions on a “global” settlement that would involve significant pension reform. My letter indicates that the letter was being sent with unanimous support of the City Council. Included in that letter were proposals regarding “pensionable pay” and “substantially equal”, two elements of the initiative proposal.

In response to the proposal to open discussions, labor leaders personally attacked me in the press as “grandstanding”, comparing it to the conduct of Mike Aguirre. I ignored those personal attacks and sat down with labor and a mediator. Unfortunately, there was no interest on the labor side in negotiating comprehensive pension reform and no ideas from your side were placed on the table. That is not to say that we failed to do some good work, however, on retiree health and some other areas. But, there just wasn’t the interest in addressing the broader issues. I haven’t criticized labor for not being interested and I am not doing so now. That’s your choice. But, don’t claim that there was not an opportunity to address these issues with the full City Council. It’s untrue.

Again, thank you for your letter.

Sincerely,

Jan I. Goldsmith
City Attorney

JIG:cbs

Enclosure: January 13, 2011 Letter

cc: Honorable Mayor Sanders (*via electronic mail*)
Honorable City Council Members (*via electronic mail*)
Jay Goldstone, Chief Operating Officer (*via electronic mail*)
Julie Dubick, Chief of Staff (*via electronic mail*)
Andrea Tevlin, Independent Budget Analyst (*via electronic mail*)

Scott Chadwick, Director Labor Relations (*via electronic mail*)
Andrew Jones, Exec. Assistant City Attorney (*via electronic mail*)
Mary Jo Lanzafame, Assistant City Attorney (*via electronic mail*)
Joan Dawson, Deputy City Attorney (*via electronic mail*)



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Dear Madams and Messrs:

This letter is sent with unanimous support of the San Diego City Council and Mayor. It is an offer to engage in mediated settlement negotiations regarding pending lawsuits and disputed legal issues. This should not be confused with annual labor negotiations under the Meyers-Milias-Brown Act.

Ann M. Smith, Esq.
Elaine Reagan, Esq.
Michael Conger, Esq.
Shirley Lee, Esq.
Ellen Greenstone, Esq.
Joel N. Klevens, Esq.
Gregorio Daniel, Esq.

January 13, 2011

As you know, we have consistently stated a goal to end most, if not all, pension-related litigation through a “global settlement.”

The benefits of a global settlement are obvious. The era of pension litigation has been inordinately expensive to both the City and your clients. Pending litigation creates uncertainty and animosity that is not healthy for employer-employee relationships. And, upon final judgments, there are fairness issues that cannot be resolved after the fact, but which could have been resolved well before judgment.

The current litigation seeking to enforce the “substantially equal” provision of Charter section 143 is an example of something that should be resolved by negotiation. The City’s position is legally correct and this lawsuit is likely to result in an order to recalculate employee contributions. Once that determination is made, employees will face significant increases in contributions.

It doesn’t have to be that way.

Our office has been searching for ways to approach “global settlement” negotiations. Such a settlement would need to resolve the legal issues by restructuring the pension system to reduce costs and preserve vested benefits and should reduce both the City’s and employees’ contributions from what they are today while providing opportunities to attract and retain quality City employees.

I believe we have found concepts that could achieve a global settlement within the above parameters. We propose to open settlement negotiations of pending litigation using an experienced mediator (sharing the cost) and with the assistance of an actuary and pension experts, to include negotiation of the following elements:

1. An agreement to freeze (for a period to be negotiated) base compensation for purposes of calculating defined benefit pensions without affecting vested benefits, thereby reducing the unfunded liability. This would reduce the City’s and employees’ annual pension contributions; in essence, capping the pension. This could involve a process for additional performance based compensation that does not count toward pensions;
2. An agreement regarding “substantially equal”;
3. An agreement to end all major litigation except for retiree health (which is on a separate negotiating schedule) and presidential leave cases;
4. Creation of a tier 3 optional retirement plan subject to IRS approval.

Creation of a tier 3 option has already been discussed publicly in connection with Proposition D. The first two elements need to be flushed out during negotiations.

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1. **An agreement to cap base compensation for purposes of calculating defined benefit pensions.**

As you know, a qualifying retired employee's retirement allowance is calculated by multiplying the employee's years of service credit by the calculation factor applicable to his or her retirement classification and age at retirement. The resulting number is the percentage of the employee's "final compensation" that equals his or her annual unmodified service retirement allowance.

For general members hired before July 1, 2009 and safety members, our pension plans ordinances define "final compensation" as the highest one-year period of the employee's "base compensation" during membership in the Retirement System. SDMC § 24.0103. "Final compensation" for general members hired on or after July 1, 2009 is defined as an average of the member's highest three years of "base compensation" while a member of the Retirement System. *Id.*

"Base compensation" is defined as "the base salary or wages paid (standard hours multiplied by the hourly rate) on a regular bi-weekly basis to an employee for his or her services in any given pay period . . ." Expressly excluded from "base compensation" is "any item of compensation or remuneration which is identified in the Earning Codes Document as excluded from Base Compensation." Among those items listed as excluded is compensation paid under a pay for performance plan. SDMC § 24.0103.

The City can cap base compensation by freezing base salaries and wages. But, that does not mean that employees' compensation must be frozen. Additional compensation could be provided through a legitimate performance-based plan that is expressly excluded under the Earnings Code Document from base compensation.

Obviously, there are some limitations. Any limit on base compensation must be prospective. The City may not take away an employee's current highest base compensation. In addition, it is likely that the performance pay portion would not be an automatic level of compensation, but would be based upon available funds and performance criteria. Of course, some employees could exceed their current compensation levels by performing well. Any such plan would be subject to good faith negotiation and current MOU's.

Done properly, the City can benefit from a cap on future pensions without having to amend the pension plan. An actuary would no longer assume increases in base compensation. As a result, the City's annual required contribution and the unfunded liability would be reduced.

From employees' viewpoint, any increase in compensation over the base would not be used to calculate their retirement allowance, but that would also reduce their contributions, thus putting more money in their pockets. Current employees whose compensation exceeds any maximum base compensation would be grandfathered in.

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What's more, current employees face a shrinking City budget that has left little room for salary increases. It is certainly possible that compensation paid under a performance-based plan with a pension cap may be higher as the pressures on the general fund subside. Since performance-based compensation does not increase base compensation, long term implementation of this policy might allow employees to benefit when the economy is doing well and the City's revenues are healthy without increasing the long-term pension unfunded liability.

2. An agreement regarding "substantially equal" provision of Section 143.

As part of such a global settlement that reduces the City's contributions, we should also explore ways to end the "substantially equal" lawsuit (I'd add efforts to settle DROP and the "main" pension case). Of course, the parameters of such a settlement would be subject to negotiation.

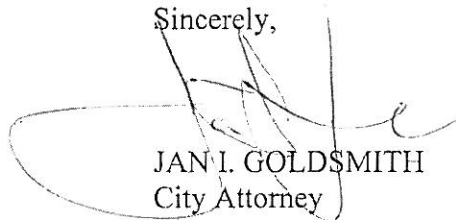
Absent a change in the litigation mentality, the City, SDCERS and our labor unions will continue to litigate over and over again. Our office will not back down as we have a client facing a huge alleged unfunded liability and some past practices have been at odds with our Charter. You will not back down as you have clients whose members cannot afford the increases in contributions we are seeking.

Going forward, we will win some and lose some. But, there will not be real winners and losers. After we win, we will hear of inequities (as we already have) and will be asked for a "do over". When we lose, members of the public will further lash out at our public employees, something we do not subscribe to. In the meantime, taxpayers and our employees will spend millions of dollars on legal fees. This cycle needs to end.

Let's move forward to retain a mediator and work on a global resolution within the frame-work outlined above. In that regard, at my request, Dean Steven Smith of California Western School of Law has offered his assistance in seeking a highly qualified mediator acceptable to all parties. I am open to others who may also assist. Our community will want us all to give this a good faith try.

Please let me know by the end of this month of your decision on whether to participate. For obvious reasons, we feel we need uniform participation to move forward.

Sincerely,



JAN I. GOLDSMITH
City Attorney

JG:cbs

cc: Honorable Mayor
Honorable City Councilmembers