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2013 MAY 24 A 0:58

Superior Court
County of Santa Clara
By S. VERA
Deputy

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, v. CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10 inclusive, Defendants. AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS	Case No. 1-12-CV-225926 *[Consolidated with Case Nos. 112CV225928, 112CV226570, 112CV226574, 112CV227864, 112CV233660]* **DEFENDANT AND CROSS-COMPLAINANT CITY'S RESPONSE TO SJPOA'S STATEMENT OF ADDITIONAL UNDISPUTED FACTS** Date: June 7, 2013 Time: 9:00 a.m. Place: Dept. 2 Judge: Hon. Patricia M. Lucas Complaint Filed: June 6, 2012 Trial Date: July 22, 2013

DEFENDANT AND CROSS-COMPLAINANT CITY'S RESPONSE SJPOA's STATEMENT OF ADDITIONAL UNDISPUTED FACTS

SJPOA's Additional Undisputed Facts and Supporting Evidence	City's Response and Supporting Evidence
1) SJPOA is a union representing police officers working for the City of San Jose ("Police Officers"). **Supporting Evidence**: • Robb Decl. ¶ 4; SJPOA RJN Ex. 17 (First Amended Complaint ["FAC"]).	Undisputed.
2) SJPOA filed this action on behalf of its members after the voters enacted Measure B. **Supporting Evidence**: • Robb Decl. ¶ 8	Undisputed.
3) SJPOA's FAC alleged, *inter alia*, Measure B violated Police Officers' vested pension rights created by the San Jose City Charter and San Jose Municipal Code, and that it violated certain rights under its collective bargaining agreement ("memorandum of agreement" or "MOA"). Specifically, it alleged Measure B sections 1506-A, 1507-A, 1509-A, 1510-A, 1511-A, and 1512-A violated the vested rights doctrine under the California Contracts Clause, was a Takings, and violated Due Process. SJPOA alleged sections 1506-A and 1512-A also violated its collective bargaining agreement. The wrongs alleged all flow from Measure B and all sections of Measure B were enacted at the same time. **Supporting Evidence**: • Robb Decl. ¶ 8; SJPOA RJN Ex. 17 (FAC ¶¶ 1, 24, 29, 35-36, 40-46, 49-53, 56, 97-100 [others].)	Undisputed as to the allegations in the SJPOA FAC, but disputed as to the truth of the allegations in the FAC. Undisputed that all the sections of Measure B were enacted at the time the voters enacted Measure B, but to the extent the SJPOA is contending that all of Measure B constitutes one legal "wrong" the City disputes this statement as a legal contention.
4) The San Jose City Charter ("Charter") obligates the City to establish and maintain a retirement plan for its employees.	Disputed as a partial paraphrase of the San Jose City Charter section 1500.

SJPOA's Additional Undisputed Facts and Supporting Evidence	City's Response and Supporting Evidence
Supporting Evidence: • City RJN Ex. A (Charter Section 1500).	
5) The Charter mandates certain minimum retirement benefits for Police Officers, and expressly authorizes the City Council to grant additional or greater benefits through the SJMC. **Supporting Evidence**: • City RJN Ex. A (Charter Section 1500 ["the Council shall provide, by ordinance or ordinances, for the creation, establishment and maintenance of a retirement plan"], Section 1504 [minimum benefits], Section 1504(e) ["The benefits hereinabove specified are minimum only; and the Council, in its discretion, may grant greater or additional benefits"]).	Disputed as a partial paraphrase of San Jose's City Charter sections 1504, 1504(e).
6) The Charter and SJMC Chapter 3.36 together detail Police Officers' pension benefits and rights and are known as the 1961 Police and Fire Department Retirement Plan ("P&F Retirement Plan"). **Supporting Evidence**: • City RJN Ex. A (Charter 1500, 1504); City RJN Ex. D (SJMC Chapter 3.36).	Disputed that the Charter and SJMC 3.36 provide police officers' with "rights". Undisputed that SJMC Chapter 3.36 provides for pension benefits and is known as the 1961 Police and Fire Department Retirement Plan.
7) The P&F Retirement Plan is administered by the Board of Administration of the Police and Fire Department Retirement Plan ("Retirement Board"). The Retirement Board establishes contribution rates on an actuarial basis, i.e. to keep the P&F Retirement Plan actuarially sound. **Supporting Evidence**: • City RJN Ex. D (SJMC 3.36.1520; SJMC 3.36.1525; see also SJMC 3.36.510 ["The retirement board shall have the exclusive control of the administration and	Undisputed.

SJPOA's Additional Undisputed Facts and Supporting Evidence	City's Response and Supporting Evidence
investment of the retirement fund"); SJMC 3.36.575 [retiree healthcare: "Contribution rates . . . shall be established by the board as determined by the board's actuary and shall be borne by the city and members of the plan"]).	
8) Police Officers and the City pay into the P&F Retirement Plan to fund it, as specified in the funding provisions of the Charter and the SJMC. **Supporting Evidence**: • City RJN Ex. D (SJMC 3.36.1520, 3.36.1525, 3.36.575).	Undisputed that Police Officers and the City pay into the P&F Retirement Plan to fund it, but disputed to the extent the SJPOA is suggesting that the payments are made only "as specified in the funding provisions of the Charter and SJMC" because payments also are made as specified in City and union agreements.
9) Retirement benefits are granted as a form of deferred compensation and inducement to future service with the City of San Jose. The structure of the P&F Retirement System has incentives for Police Officers to work with the City for twenty to thirty years. **Supporting Evidence**: • City RJN Ex. A (Charter Section 1504(a) [minimum benefits start at 20 years of service]; SJPOA RJN Ex. 18 (Total Compensation Information from San Jose Office of City Manager ["the value of the City's total compensation package also includes the cost of benefits, such as heath insurance and retirement benefits"]); Robb Ex. A [pension calculation incentivizing longer service with City]; Robb. Ex. B-C (various recruiting brochures listing retirement as element of compensation]); Robb Ex. D (1980-81 recruitment brochure: "For San Jose Police Officers, security now means fully-paid medical and dental coverage . . . . [/p] Security for the future means . . . a retirement program . . . ."]; *ibid.* at p. 4 ["Saving that amount would be difficult on your own, but	Disputed and this statement is not a fact but a legal contention.

SJPOA's Additional Undisputed Facts and Supporting Evidence	City's Response and Supporting Evidence
together you and the San Jose Police Department can provide for your long-range financial security"]).	
10) In 2011, the City began a campaign to reduce all City employees' pension benefits, including those of Police Officers, by threatening to declare a fiscal emergency and by sponsoring a voter ballot initiative, Measure B, to attack pension rights. The City's mayor or his representatives made repeated public assertions that, by Fiscal Year ("FY") 2015-16, the City's retirement contribution costs would reach $650 million per year. **Supporting Evidence**: • Robb Decl. ¶ 7; City RJN Ex. B (Measure B); SJPOA RJN Ex. 16 (State Auditor Report 8/2012 at 1); SJPOA RJN Ex. 23 (7/28/10 Rules and Open Government Committee Report [discussing potential ballot measure]); SJPOA RJN Ex. 24 (8/3/10 City Council Minutes [discussing ballot measure]); SJPOA RJN Ex. 25 (5/13/11 Memorandum from Mayor to City Council recommending declaration of fiscal and public safety emergency]).	Disputed.
11) In fiscal years 1993 through 2004 the City reduced its regular contributions into the P&F Retirement Plan by approximately $80 million. It did so consistent with a theory that because it was required to pay all UAAL it was accordingly entitled to take all gains. The Retirement Board later concluded in 2011 that this subsequently increased the P&F Retirement Plan's unfunded liability by approximately 44%. **Supporting Evidence**: • SJPOA RJN Ex. 19 (3/28/11 P&F Retirement Plan Memorandum from Representative S. Kaldor to Chairman D. Bacigalupi re ARC Calculation); Robb	Disputed.

SJPOA's Additional Undisputed Facts and Supporting Evidence	City's Response and Supporting Evidence
Decl. ¶ 21 & Ex. E (2/19/98 Saltzman & Johnson Legal Memorandum); SJPOA RJN Exs. 27-28 (9/17/97 and 12/29/97 City Attorney Legal Memoranda).	
12) In early 2012, the independent actuary for the P&F Retirement Plan issued a report with updated projections for the City's retirement costs showing the City's retirement contributions just for Fiscal Year 2012-13 would actually be $55 million less than previously budgeted by the City. The actuary estimated that FY 2015-16 costs would be approximately $320 million for both the P&F Retirement Plan and the Federated Plan. **Supporting Evidence**: • SJPOA RJN Ex. 22 (12/1/11 Memorandum from City Manager to Mayor and City Council re Declaration of Fiscal Emergency ["In July 2011, Cheiron had projected that the retirement contribution for Fiscal Year 2012-2013 would increase to $160 million. Based on the Board action today, the estimated Fiscal Year 2012-2013 retirement contribution for pension will be approximately $105 million"]); Gurza Ex. 57 (actuarial estimates for P&F Retirement Plan and Federated Retirement Plan).	Disputed, SJPOA does not differentiate between pension and retiree health contributions, and irrelevant.
13) The Mayor immediately withdrew his fiscal emergency proposal but nonetheless the City Council placed Measure B on the ballot for voter approval. **Supporting Evidence**: • SJPOA RJN Ex. 20 (12/1/11 Memorandum from Mayor to City Council re "Fiscal and Service Level Emergency and Pension Reform Ballot Measure").	Disputed and irrelevant.

SJPOA's Additional Undisputed Facts and Supporting Evidence	City's Response and Supporting Evidence
14) Measure B was enacted by San Jose's voters on June 5, 2012. **Supporting Evidence**: • SJPOA RJN Ex. 21.	Undisputed.
15) After Measure B was enacted, the California State Auditor determined the City's retirement cost projections were "unsupported and likely overstated." **Supporting Evidence**: • SJPOA RJN Ex. 16 (California State Auditor's Report, August 2012 at 1 [the City "referred to a projection that the city's annual retirement costs could increase to $650 million by fiscal year 2015–16, a projection that our actuarial consultant determined was unsupported and likely overstated"]).	Disputed as a partial paraphrase of the Auditor's report and irrelevant.
16) Measure B purports to change Police Officers pension rights going forward. **Supporting Evidence**: • City RJN Ex. B (Section 1502-A).	Disputed.
17) Measure B further provides that it "Supersedes all Conflicting Provisions," including other Charter and SJMC sections. **Supporting Evidence**: • City RJN Ex. B (Section 1503-A).	Undisputed as to the text of Measure B.
18) Measure B added new provisions not in the prior Charter expressly reserving voters' rights and anti-vesting language. **Supporting Evidence**: • City RJN Ex. B (Section 1504-A as reservation of voter's rights); *id.* (Section 1508-A(h) as express anti-vesting language); City RJN Ex. A (Charter).	Disputed. Some of Measure B's reservations of rights language existed in the prior Charter.

SJPOA's Additional Undisputed Facts and Supporting Evidence	City's Response and Supporting Evidence
19) Generally, Police Officers have only paid that pension UAAL generated by increased benefits. **Supporting Evidence**: • City RJN, Ex. D (SJMC 3.36.1520: employee contributions defined as not including "any deficit resulting from the fact that previous rates of contribution . . . were inadequate"]); SJMC 3.36.1550: "the City of San Jose shall contribute to the retirement fund, monthly, all such amounts . . . to make this plan actuarially sound"]; SJMC 3.36.1555: employees only pay UAAL for new or increased benefits); City RJN Ex. A (Charter Section 1500 [authorizing benefits in SJMC]; *id.* (Charter Section 1504(e) [expressly authorizing the City Council to "grant greater or additional benefits" beyond those in the Charter]); *id.* (Charter Section 1504(b)-(c) [mandating actuarially sound system, including new benefits]; SJPOA RJN Exs. 1, 11, 13, 14 [legislative history of City payment of all UAAL in Charter and SJMC, except for between 1965-71]); Robb Decl. ¶¶ 13-14 [officers do not pay UAAL; all current Police Officers hired after City enacted ordinance obligating itself to pay all UAAL]); City RJN Ex. D (SJMC 3.36.120.A ["the rights of each member . . . to benefits accrued . . . shall be nonforfeitable]).	Disputed.
20) Police Officers did not pay UAAL directly or otherwise waive any vested right through Article 5.1 of the 2010-2011 SJPOA MOA. Police Officers' contributions were not credited to Police Officers' individual retirement accounts and not the P&F Retirement Fund's UAAL. Finally, those additional contributions were "one-time" only and limited to 2010-2011.	Disputed.

SJPOA's Additional Undisputed Facts and Supporting Evidence	City's Response and Supporting Evidence
Supporting Evidence: • Gurza Ex. 29 at 551 (Article 5.1 of 2010-2011 SJPOA MOA ["One-Time Additional Retirement Contributions"]); id. at 552 ["These contributions shall be treated in the same manner as any other employee contributions," i.e., "on a pre-tax basis" and "subject to withdrawal, return and redeposit"]); Gurza Ex. 30 at 571 [subsequent MOA deleting provision for increased contributions]; Vado Decl. ¶¶ 7-11; Robb Decl. ¶¶ 14-19 and Ex. F.	
21) If applied to Police Officers, Section 1506-A will require them to pay for 50% of ***existing*** UAAL through salary decreases of 4% per year, with a maximum decrease of 16%, even though that UAAL accrued when the SJMC mandated the City pay for it. **Supporting Evidence**: • City RJN Ex. B (Section 1506-A); Robb Decl. ¶ 15.	Disputed.
22) Police Officers have a vested right to the SRBR upon retirement. **Supporting Evidence**: • City RJN, Ex. D (SJMC 3.36.580 [establishing initial funding mechanism of 10% of P&F Retirement Plan; eligibility; the only conditions for distribution or transfer of SRBR funds; and conditions precedent for distribution to members such that distributions "shall" be made by the Retirement Board, i.e., substantial "excess earnings" from the P&F Retirement Plan; placing no time limitations on funding or distribution of funds; not requiring existence of no UAAL to distribute SRBR funds]); City RJN Ex. A (Charter Section 1500 authorizing benefits in SJMC); id. (Charter Section 1504(e) expressly authorizing the City Council to "grant	Disputed and this is a legal contention not a statement of fact.

SJPOA's Additional Undisputed Facts and Supporting Evidence	City's Response and Supporting Evidence
greater or additional benefits" beyond those in the Charter); City RJN Ex. D (SJMC 3.36.120 [employee rights not forfeitable]).	
23) The City Council has no discretion under the P&F Retirement Plan *whether* SRBR funds are distributed. The SJMC makes distribution of SRBR by the Board funds mandatory. The City's only authority is to approve the SRBR's funding methodology, which it already did in 2002. **Supporting Evidence**: • City RJN Ex. D (SJMC 3.36.580, subd. D2 & D5 ["the *board* shall make an annual distribution from the annual SRBR," italics added]; *id.* D5 ["Upon approval of the methodology by the city council, the *board* shall make distributions in accordance with such methodology," italics added]); City RJN Ex. C (SJMC 3.28.340, subd. E [City authority over Federated Plan]); City RJN Ex. N [Resolution No. 70822 (2002) (approving SRBR funding methodology for Board to administer)]).	Disputed.
24) The City abolished the SRBR in 2013, pursuant to Section 1511-A. **Supporting Evidence**: • Gurza Ex. 55 (Ordinance repealing SJMC 3.36.580 effective March 1, 2013).	Undisputed.
25) Police Officers have ***MOA-based rights*** defining their contributions for retiree healthcare, i.e., on a 1:1 ratio, expressly capping any increase in contribution rates for Police Officers at 1.25% per year, and capping Police Officers' contributions to pay for retiree healthcare to no more than 10% of their pensionable salary. The MOA also mandates meet and confer to determine how to assess any	Undisputed to the extent the SJPOA is describing its current MOA, which expires on June 30, 2013. The City is honoring the SJPOA's current MOA.

SJPOA's Additional Undisputed Facts and Supporting Evidence	City's Response and Supporting Evidence
excess. **Supporting Evidence**: • Gurza Exs. 29 and 41 (SJPOA MOAs [Art. 50, including 50.1 and 50.3: "member cash contribution rate shall not have an incremental increase of more than 1.25% of pensionable pay in each fiscal year"]; [Art. 50.4: mandatory meet and confer; "Nothing in this Article shall be construed to obligate Plan members to pay more than 10% of pensionable pay or the City to pay more than 11% of pensionable pay to fund retiree healthcare"]); City RJN, Ex. D (SJMC 3.36.575 [contributions set by retirement board]); SJPOA RJN Exs. 29, 30 [P&F Retirement Board Resolution Nos. 3761, 3800]; Robb Decl. ¶¶ 22-24.	
26) Upon retirement Police Officers have ***vested rights*** to City payment of the "lowest cost" retiree healthcare plan available to current Police Officers. **Supporting Evidence**: • SJPOA RJN Ex. 7 (Ordinance 21686, including former SJMC 3.36.1930); SJPOA RJN Ex. 10 (Ordinance 25615); City RJN Ex. A (Charter Section 1500 [SJMC is proper source of benefits]; *id.* (Charter Section 1504(e) expressly authorizing the City Council to "grant greater or additional benefits" beyond those in the Charter); SJPOA RJN Exs. 8-9 (P&F Retirement Plan Handbooks); SJPOA RJN Exs. 11-15 (P&F Retirement Plan Annual Reports); Salvi Decl. ¶¶ 3-5; Fehr Decl. ¶¶ 3-5; Robb Decl. ¶¶ 22-26.	Disputed and this is a legal contention not a statement of fact.
27) If Section 1512-A is applied to Police Officers, their contributions can exceed the yearly and overall contractual caps in the MOA, and Police Officers would have no recourse to the	Disputed.

SJPOA's Additional Undisputed Facts and Supporting Evidence	City's Response and Supporting Evidence
meet and confer provisions of the MOA the parties negotiated to determine how to pay for any contributions above 10%. Additionally, Police Officers will lose their right to City payment of the premium for the lowest cost healthcare plan available to active Police Officers. **Supporting Evidence**: • Robb Decl. ¶¶ 22-26; Selvi Decl. ¶¶ 3-5; Fehr Decl. ¶¶ 3-5.	

DATED: May 24, 2013

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