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

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| **Hearing Date:** | **Ruling Upon Submission After Oral Argument** |
| **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** |

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**Ruling Upon Submission After Oral Argument**

**Plaintiff alleges two causes of action each seeking declaratory and injunctive relief directed at declaring certain alleged retroactive retirement benefits 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), 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 final annual compensation multiplied by the number of years of service for members who retire 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 43, 56, 57; Exhibit C (the Towers Perrin Analysis), at p. 5.**

**The County asserts that on December 4, 2001, its Board of Supervisors approved the 3% at 50 pension benefit in Resolution NO. 01-410 (the "2001 Resolution"). FAC, Paragraph 66 and Exhibit D thereto. Under the 2001 Resolution, only persons employed as of the effective date of the 2001 Resolution -- June 28, 2002-- are eligible for the 3% at 50 retirement benefit. FAC, Paragraph 67. Persons retiring before June 28, 2002, are not eligible, but instead, receive a 2% at 50 retirement benefit. FAC, Paragraphs 54 and 67. Thus, as of the time the Board adopted the 2001 Resolution, one had to remain in**

**the County's employee until June 28, 2002, to be eligible for the 3% at 50 retirement benefit.**

**The County further alleges that under the relevant provisions of the County Employees Retirement Law ("CERL"), Gov't Code, Sections 31450 et seq., retirement benefits "are funded in the year they are earned through a mix of County and employee contributions to the retirement fund. *See* Gov't Code Section 31580." FAC, Paragraph 44. The County avers that "the County is obliged to fund retirement benefits earned in a given year through some combination of employer and employee contributions made during the same year." FAC, Paragraph 44. Section 31580 of the Government Code requires the County to "'appropriate annually' the funds 'necessary to defray the entire expense of administration of the retirement system.'" FAC, Paragraph 44.**

**The County relies on actuarial studies to determine annual contributions for County retirement benefits. FAC, Paragraph 45 (citing Gov't Code Section 31543). Finally, the County avers that prior to its Board's approving the 2001 Resolution, the County obtained an actuarial study--the Towers Perrin Report (FAC, Exhibit C)-- as required by Gov't Code Section 7507 ( FAC, Exhibit D (2002 Resolution) ("the County has provided an actuarial study showing the potential cost of the implementation of such benefits").**

**As to the 1st Cause of Action, plaintiff alleges that the County Board of Supervisors' approved the 3% at 50 benefit without seeking the approval from the electorate required by Article XVI, Section 18(a), even though the Board knew, based on the Towers Perrin Report, that (1)the total 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; (3) then-existing employee contributions to OCERS did not cover the benefit's actuarial cost; and (4) monies from the general fund in future years would have to cover the latter projected 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, the County acknowledges that courts have interpreted Article XI, section 10(a) 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"[i.e., as of June 28, 2002] 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 [as of June 28, 2002] extra unearned (deferred)**

**compensation for services rendered before the enhanced formula went into effect." Opposition p. 11.**

**The County 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 Deukmejian 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 is based on actuarial projections. Motion, pp. 7-8. Defendant further argues that the County has admitted 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. See also FAC, Paragraph 45.**

**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 benefit 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, as well as 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 foritiori, 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 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 relies on 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 projected cost of a new pension benefit not approved by the electorate. 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 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 ground 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 in that case, 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 2007 date of that report.**

**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) requires indebtedness and revenue to be balanced in reference to "such year" or in "any year." The express language of the constitutional provision also references indebtedness or liability "exceeding in any year" income and revenue "provided for such year." In Rider, supra, 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).**

**This interpretation of Article XVI, section 18(a), adopted on November 5, 1974, is consistent with subsequent legislation expressly allowing counties to amortize the cost of pension benefits over thirty years. Thus, in 1992, the Legislature enacted Gov't Code Section 31453.6, which provides that "...the board of retirement may, at the request of the board of supervisors, adopt a funding period of 30 years to amortize unfunded accrued actuarial obligations, as determined by their actuary...for benefits applicable to all membership categories for the purpose of determining employer contribution rates for counties and districts." It is uncontested that the benefits at issue here are subject to this statute; the County so alleges. FAC, Paragraph 48.**

**The California Attorney General has rejected the County's argument that a pension obligation based on actuarial valuation is an indebtedness. In 1982, Attorney General Deukmejian answered the question of "whether the so-called 'unfunded liability ' of the state's portion of the Public Employees' Retirement System (PERS) violates the debt limitation provision of the California Constitution" (Opinion 82-405 at p.571 (attached at Exhibit 6 to AOCDS' Compendium of Authorities)) as follows:**

> **"The actuarial term 'unfunded liability' fails to qualify as a legally enforceable obligation of any kind. ...In other words an 'unfunded liability' is simply a projection made by actuaries based upon assumptions regarding future events. No basis for any legally enforceable obligation arises until the events occur and when they do the amount of liability will be based on actual experience rather than projections."**

**Id. at p. 574**

**The County's interpretation of Article XVI, section 18(a), requiring realization of the entire 3% at 50 retirement benefit in one year appears unprecedented even in other jurisdictions that have considered the issue under their balanced budget constitutional provisions. See.e.g, Rochlin v. State (Ariz. 1975) 540 P. 2d 643 (cited in the Opinion at p. 575) (Exhibit 4 to AOCDS's Compendium of Authorities); non-California cases cited at p. 10 of the AOCDS Motion. The court concedes that these cases were addressing balanced-budget provisions in state constitutions that are not identical to Article XVI, section 18(a). The County has not cited a single case from any other state that has adopted its argument that the full actuarial value of a pension benefit is realized in the year of the benefit's enactment for purposes of a balanced budget provision in a state constitution. See**

**Opposition, pp. 7-8.**

**At oral argument, the court asked the County's counsel whether there has been any California case that has adopted its interpretation of Article XVI, section 18(a), as applied to the actuarial value of a public benefit paid over time. The County cited County of Los Angeles v. Payne (1937) 8 Cal. 2d 563. That case does not address a public benefit paid in periodic installments over time. Instead, it addressed whether, when the Board of Supervisors approved a single emergency payment for aid to indigents, its budget was balanced. The specific issue was whether in determining the revenue side of the equation, the County could use the entire amount of taxes assessed "for the current year" (8 Cal. 2d at p. 578) even if the County predicted that it would ultimately collect less tax revenues for that year. The Supreme Court held that assessed taxes was the proper measure, and that the single expenditure involved in that case did not transgress Article XVI, section 18(a). Id. at pp. 577-578.**

**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(a)**

**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, the appellate court considered whether buying out accrued sick leave as an alternative to increased service credit under "an established" retirement benefit constitutes "extra compensation" prohibited by Article XI, section 10(a). In finding no constitutional transgression, the American River 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 rational 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 (internal quotation marks omitted).**

**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 10(a)-- other than itself -- that would turn on whether one is a current, as opposed to retired employee. More specifically, the County 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.**

**Second, in Sweesy, supra, the Supreme Court rejected distinguishing between former and current employees as to a constitutional attack under the prohibition against gifts of public funds as to pension benefits paid to a widow of an employee that were enacted after the employee retired, but before his death: "No 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, and no distinction may be drawn on that basis." 17 Cal. 2d at p. 361.**

**In Nelson, the reasoning of Sweesy was extended to an attack on purported "retroactive" pension benefits under Article XI, section 10(a). The appellate court observed that albeit being added to the state Constitution in 1970, Article XI, section 10(a) "did not introduce a new concept to the law of California." 21 Cal. App. 3d at p. 918. The Nelson court reasoned that the then new constitutional provision extended the rule to charter cities and counties that had previously been applicable to the state Legislature and general law counties and cities, and that the provision was "closely related in purpose" to the constitutional prohibition on gifts of public funds. Id. "Uniform precedent" led the court to conclude that paying an employee or his widow increased retirement benefits enacted after the employee retired did not transgress Article XI, section 10. Id. at p. 919.**

**Third, to the extent that the County argues that pension benefits should be treated like the overtime payments or vacation pay in Ventura and Seymour, supra, 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.**

**Fourth, 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.**

**Dated: 2/26/09**

**Judge Helen I. Bendix**