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MCERA Board of Trustees and
Administrator Jeff Wickman
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What follows is a paragraph-by-paragraph critique of Ashley Dunning's letter to me on behalf of the MCERA board. Ms. Dunning was responding to my letter of September 15, 2015 in which I the board to place on its agenda a discussion of whether to undertake an investigation of the findings by the Marin County Grand Jury that benefits had been granted despite failures to comply with California Government Code section 7507.

Para 3:
"MCERA is not privy to the details of the CCCERA situation other than by press reports."

The entire legal analysis was available on line at the CCCERA website on August 5, 2015. Ms. Dunning's letter was dated October 5, 2015, fully two months later. The report was 10 pages plus exhibits. There was no excuse for not knowing the details.

"We suspect the legal authority on which CCCERA Board is relying is … authority to determine… compensation earnable. 31461, 31542, 31542.5."

Ms. Dunning's suspicion was wrong. None of these code sections was mentioned in the CCCERA memo.

Para 8 and 9:
"That discretion and authority is not the same as the authority you request MCERA to exercise…"

The underlying premise of this statement is flawed. I did not ask the Board to exercise its authority under compensation earnable. I did not ask MCERA to disallow or invalidate any benefits. I asked only that MCERA place on its agenda a discussion of an investigation into whether substantial sums were being paid improperly.

Para 10:
"The claim that insufficient information was provided prior to the grant of benefits … has been addressed by … Protect Our Benefits v San Francisco."

"There, the court addressed a party's claim that actuarial reports presented to the BOS in connection with a proposed charter amendment were insufficiently detailed."

The case has nothing in common with the cases cited by the Marin Grand Jury. It is simply not relevant. In "Protect our Benefits" the voters, through the initiative process, wanted to change the terms of a benefit they themselves had previously *lawfully* granted, also through the initiative process. This was a case of buyer's remorse.

The cases cited by the Marin Grand Jury were not cases of buyer's remorse. The issue in Marin is whether the benefits were lawfully granted in the first place, not that they were legally granted and the granting party has now decided to try to rescind them. The question is whether failing to meet the requirements of a statute for public disclosure renders the grant of benefits unlawful in the first place.

Para 11:
" … The Orange County Board of Supervisors itself sought to rescind benefits that it had granted on the grounds that it had …"

"The Second District Court of Appeal rejected that effort … restated … the well established vested rights principles that do not permit the unwinding of benefit enhancements because of later claims that the grantor of the benefits had insufficient financial information needed to grant the benefit …"

This is also a case of buyer's remorse. It too is irrelevant. In Orange County the GRANTOR of the benefit sought to rescind benefits that the GRANTOR had lawfully granted. Once again this is not at all like the cases here in Marin in which the granting agencies failed to follow the law and provide required information to the public. To repeat, the question in Marin is whether failing to meet the requirements of a statute for public disclosure renders the grant of benefits unlawful in the first place.

The concept of vested rights is also not relevant to this conversation because benefits that were not lawfully granted, which is the open question, cannot be vested and therefore are not subject to the California Rule.

Para 13:
"While this letter is not intended to analyze all the legal issues potentially implicated by the Grand Jury report…"

Common sense, and probably legal ethics, require that before foreclosing even the possibility of an investigation into a situation where tens, perhaps hundreds, of

millions of taxpayer dollars are at stake one would go out of his or her way to consider all the legal issues potentially implicated.

Para 14:
"… there is both a strong presumption in favor of the validity of legislative actions, as well as reluctance by courts to invalidate such actions on a procedural, rather than substantive, basis. Typically, questions of prior public notice and financial data are deemed to be procedural."

If Ms. Dunning was on trial for her life and the prosecutor said, "Judge, typically, we hang people under these circumstances," you can be pretty sure she would want her attorney to ascertain what circumstances qualified as atypical, so that she might avoid being hanged.

Similarly, when Ms. Dunning says, *"Typically, questions of prior public notice and financial data are deemed to be procedural,"* it is certainly worth knowing what circumstances qualify as atypical. Yet she never explored that question. Section 7507 has only two parts. One involves "financial data": Have an actuary calculate the future costs. The other involves "prior public notice": Make public at a public meeting at least two weeks prior to adoption.

Without these two items, 7507 ceases to exist. It is gutted, a blank page. In two cases Ms. Dunning did not cite the court said:

… if the failure to comply with the procedural requirement invalidates the purpose of the statute, the statute is mandatory. City of Santa Monica v. Gonzales (2008),

… if the procedure is essential to promote the statutory design, it is 'mandatory' and noncompliance has an invalidating effect (Ibid., Cal-Air Conditioning, Inc. v. Auburn Union School District (1993).

So, perhaps, 7507 is the atypical case. It sounds like it to me. But it is not my opinion that matters. Nor should it be Ms. Dunning's. With such large amounts of public money at stake, a court should decide whether 7507 qualifies as atypical and whether its requirements are substantive or procedural.

Para 16:
"MCERA is … required by the California Constitution to follow the terms of the plan … unless and until a court of appeals orders otherwise. In that context, there does not appear to be a basis for MCERA to engage in the investigation that you propose, because MCERA would have no power to invalidate the enhanced benefits based on any such investigation, absent such a judicial determination."

Does anyone read Catch-22 anymore? Can Ms. Dunning really be saying that the board can't do an investigation because no court of appeal has given it prior

authorization to act on the results of such an investigation? Wow! How does Ms. Dunning propose the court of appeal should get the information in the first place, if not from the this board? Should it use tarot cards? Should it throw dried bones? The conditions Ms. Dunning asserts lead to the absurd conclusion the even if the board knew with certainty that a benefit had been granted illegally it could not act unless a court of appeal had previously authorized it to do so.

Contrary to Ms. Dunning's assertion, the Board, as a fiduciary to the plan members, has the authority and obligation to do such an investigation and to then petition a court of appeal for guidance.

In conclusion, Ms. Dunning's analysis of my letter to the board was inaccurate and incomplete. She admits she did not have all the facts and did not examine all the relevant points of law. She relied on a "suspicion", one that was incorrect. She cited inappropriate and irrelevant cases. She made a sweeping generalization that did not allow for any exceptions. She set up a construct that ties the board's hands so it may not act even when the facts are clear.

Ms. Dunning's letter was not an unbiased analysis of the issues raised by my letter. It was an advocacy piece designed to make a potential problem go away. Ms. Dunning has disqualified herself from any further participation in this matter.

Respectfully,

David C. Brown
Citizens for Sustainable Pension Plans