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October 5, 2015

David C Brown
25 Country Club Drive
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Dear Mr. Brown,

The Marin County Employees' Retirement Association (MCERA) Board of Retirement and Retirement Administrator received your letter dated September 14, 2015, and the Board Chair and Administrator have asked me to respond to you on their behalf.

The reference in your letter to the recent press articles describing actions taken by the Contra Costa County Employees' Retirement Association (CCCERA) Board of Retirement with respect to retirement benefits paid to former Orinda-Moraga Fire Chief Nowicki is interesting in light of MCERA's current challenges with a similar topic.

Specifically, while MCERA is not privy to the details of the CCCERA situation other than as provided by press reports, we suspect that the legal authority on which the CCCERA Board is relying is, at least in part, based on the authority granted to all retirement boards operating under the County Employees Retirement Law of 1937 (CERL) to "determine" the "compensation earnable" of its members on which retirement allowances are calculated (Gov. Code sec. 31461), as well as the responsibility under that provision and others in the CERL to assess whether any particular compensation was improperly "paid to enhance a member's retirement benefit under that system" (See, e.g., Gov. Code secs. 31542 and 31542.5). The CERL has specifically authorized county retirement boards operating thereunder to exclude such compensation from their determination of compensation earnable of members receiving the payment(s).

This is one of the legal principles addressed in litigation currently pending against MCERA. Namely, MCERA's Board determined in its December 19, 2012 *Policy Regarding Compensation Earnable and Pensionable Compensation Determinations* that under section 31461 it has the authority, discretion and responsibility to exclude from compensation earnable, among other things, the following compensation:

(1) Benefits that were originally provided in-kind to members and that some members are permitted to convert to cash by the County and other plan sponsors (e.g., "waiver of health insurance cash back" and "125 plan revision"); and

(2) Payments for services rendered outside of normal working hours (e.g., standby/on-call pay, administrative response pay, and any form of call-back even if not paid at overtime rates).

Various unions and individuals sued MCERA and its Board as a result of that action, and in July 2013, the Marin County Superior Court upheld MCERA's action by granting MCERA's motion to dismiss the case with prejudice. Petitioners appealed, however, and the matter now has been fully briefed to the First District Court of Appeal. The parties are waiting for a date for oral argument to be set. The case is: *MAPE, et al. v. MCERA* (1st App. Dist., Div. 2, A139610).

We expect this case to answer the question of the scope of a CERL Board of Retirement's discretion and authority to exclude from retirement allowance calculations compensation that the Board determines under applicable law should not, or may not, be included.

That discretion and authority is not, however, the same as the authority you request MCERA to exercise with respect to the recent Marin County Civil Grand Jury report on pensions. The Grand Jury report claims that the County and three other plan sponsors of MCERA granted pension enhancements between 2001 and 2006 in a manner that "appears to have violated disclosure requirements and fiscal responsibility requirements of the California Government Code."

The claim that insufficient information was provided to the public prior to the grant of benefits has recently been addressed by the First District Court of Appeal in *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619. There, the court addressed a party's claim that actuarial reports presented to a board of supervisors in connection with a proposed charter amendment were insufficiently detailed. The court rejected that argument as a basis to overturn the charter amendments. Specifically, the court observed, "California courts have been most reluctant to overturn the results of an election based on a procedural defect in placing a measure on the ballot once the election has been held and the voters have spoken. [Citations omitted]." *Id.*

The statement in the Grand Jury report that plan sponsors did not follow rules relating to "fiscal responsibility" also faces similar legal infirmities. Indeed, in another recent published case, the Orange County Board of Supervisors itself sought to rescind benefit enhancements that it had granted on the grounds that it had allegedly violated a constitutional debt limit and made an unconstitutional gift of public funds by enhancing benefits based on retroactive service. *County of Orange v. Assoc. of Orange County Deputy Sheriffs* (2011) 192 Cal.App. 4th 21. The Second District Court of Appeal rejected that effort too and restated, once again, the well-established vested rights principles under California law that do not permit unwinding of benefit enhancements because of later claims that the grantor of the benefits had insufficient financial information needed to grant the benefit, or did not, as claimed in the Grand Jury report, engage in "fiscal responsibility". As the court observed in response to the "fiscal irresponsibility" argument that the county made in that case, "'Courts examining a potential violation of the Debt Limit are not directed to sit in *post hoc* judgment

of the *wisdom* of a municipality's income and revenue estimates.' [Citation omitted.]" *Id.* at 38 (emphasis in original).

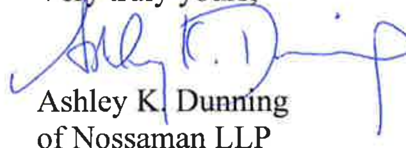
While this letter is not intended to analyze all legal issues potentially implicated by the Grand Jury report and, as you note, a number of legal memoranda already have been prepared on that topic, three additional points warrant brief mention.

First, as exhibited in the cases described above, 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.

Second, there is a difference between a "void," and a "voidable," action. Courts have made clear that, even in the context of a statute that is *required* to be followed, actions taken in violation of the statute must be challenged in court within the applicable statute of limitations, unless there is a continuing violation of the statute that may be challenged. *See, e.g., Marin Healthcare Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861 (even an act taken in alleged violation of the conflict of interest prohibition in Gov. Code section 1090 must be timely challenged to be voided). Here, the alleged violations occurred 9 to 14 years ago, without a continuing disclosure obligation of the plan sponsors that relates back to the original grant of benefits.

Finally, as you noted in your letter, MCERA is a fiduciary to its members and beneficiaries, though it is not, as you also assert, a fiduciary to its plan sponsors, who are the "settlor" vis-à-vis the trust, not the beneficiary to whom the trustee owes fiduciary duties of care and loyalty. *City of Sacramento v.* PERS (1991) 229 Cal. App. 3d 1470, 1493. MCERA is also an administrative agency that is required by the California Constitution (art. III, sec. 3.5) to follow the terms of the plan that it administers, unless and until a court of appeal 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 an investigation, absent such a judicial determination.

Very truly yours,



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cc: MCERA Board of Retirement
Jeff Wickman, Retirement Administrator