

PERS - PUBLIC AGENCY COALITION (PAC)

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THE ALERT

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The Orange County Lawsuit - An Update

Most of our readers have been following the recent decision made by the Orange County Board of Supervisors to file suit over the deputy sheriffs' retroactive benefits, which could have sweeping implications across the state. Mr. Moorlach, who is a Board of Supervisor himself, has been pushing the Board pretty hard on this issue for the past year. His brain child lawsuit attempts to find retroactive benefits unconstitutional under three provisions, which we will get to later.

First, the fun part: rumors. We heard that the County has spent over \$500,000 to develop a legal strategy for challenging these pension benefits. The County has not released any of the legal opinions produced by the firms, but insiders say that the County commissioned proposals from four law firms; two of which indicated that this case is not legally viable. Well, guess who the County hired? The firm that told them they had a chance in court.

But let's back up: In 2001, the County granted a 3 percent at 50 benefit formula to apply retroactively to its deputy sheriffs. After some thought, the County, which faced an ever-growing unfunded liability, decided that the debt they incurred was too high, and that the benefit enhancement should have only applied prospectively. Before presenting his request to the Orange County Board of Supervisors, Moorlach provided his legal

analysis to a constitutional law professor for review. Professor John Eastman, Dean of the Chapman University School of Law, stated that he agreed with the legal conclusions and testified on behalf of Moorlach's plan. So, Moorlach had some backup when he presented his proposal to the Board.

Moorlach's Legal Argument

Now, before you write this off as just a PR stunt, read Moorlach's justification for his lawsuit. (Yes, despite what you just read... here's where our cynical side meets our hypocritical side.) He makes a few solid arguments. He stated that retroactive benefits are a violation of several provisions of California's Constitution. Specifically, the Constitution prohibits **any county from incurring any indebtedness or liability that exceeds the income and revenue provided in that year, without seeking the approval of two-thirds of the local voters.** This is known as the *debt limitation* provision. Moorlach claims that the retroactive pension benefits created an immediate liability for the County in excess of the revenues available in that year to fund the benefits, and the pension increases were not approved by local voters.

Second, the Constitution prohibits a local government body from granting *extra compensation* to a public officer or employee after service has been rendered or a contract has been entered into and performed in whole or in part. Because the Constitution also prohibits the Legisla-

INSIDE THIS ISSUE:

A Few Bits About PERS	4
AB 2530 (Garrick) State's OPEB funding	6
SB 1586 (McLeod) Alternative Fund for Public Agency Prefunding	6
States May Face Future Funding Difficulties for Retiree Bene-	7
Seminar Workbook Information	7

ture from authorizing a county to grant extra compensation, the statute authorizing retroactive benefit increases will also be argued as unconstitutional.

And finally, on the premise that retroactive pension increases were granted as extra compensation, Moorchach argues that **the benefits also violate the provision in the California Constitution prohibiting any governing body from making a gift of public funds.**

Eastman's Take

First, let's talk about Professor Eastman's bias. Eastman publically has indicated that he has personally been looking for an opportunity to file a taxpayer lawsuit challenging public pensions. Because of his current position, he won't have the opportunity to try the case himself, but the organization he runs, the Center for Constitutional Jurisprudence, will likely weigh-in with an amicus brief in support of the County's position.

As for the detailed aspects of the case, Eastman says that Moorchach is "absolutely right," since the County has no legal authority to grant a significant pension increase for past work performed, especially since there was no additional employee obligation to the county in exchange for the added benefits. Based on a "clear text" reading of the Constitution, he believes that Orange County has a strong case in court.

Some opponents argue that past case law has established the legality of retroactive pension increases. Eastman counters that the case law has been limited to existing retirees—known as individuals in a "pensionable status." The courts have upheld increased benefits for those in pensionable status because it is reasonable for those individuals to expect that some adjustments in the pension system might occur. The success of Moorchach's case may come down to the fine line distinction between active employees and those in a pensionable status. (If retroactive benefits for active employees are considered a gift of

public funds, how can an ad hoc COLA paid from general funds of the agency not also be considered a gift? Ah, but we are getting too literal here, aren't we?)

What about the retirees living under those existing premises? The County has made it clear that the annuities that have been granted to those deputies who have retired under the 3 percent at 50 formula will not be forced to "give the money back." But those who are getting ready to retire would be affected. Opponents argued that the court must consider the human cost of its decision, since many retirees chose to retire based in good faith reliance on the laws in effect at the time of their decision. Eastman argues that the human factor shouldn't have any impact on the court's decision.

What If?

If Moorchach's case is successful, there are some potentially disturbing consequences for local officials — **yes, this means YOU.** The "precedent" established this case would apply statewide in effect, it would overturn all other retroactive benefit increases granted by any other public entity. Of course, this case would establish a precedent, but it wouldn't automatically void benefit agreements. There's a provision in the California Constitution stating a government entity **can't void a statute or ordinance unless it is deemed unconstitutional by the state Appeals Court or a higher authority.** Once the case reaches that point, then an employer could revoke the benefits granted under the unconstitutional statute. An employer that chooses not to revoke the benefits would be open to a lawsuit by any local taxpayer.

As many have guessed, labor representatives are pouring big money into the case to back the deputy sheriffs. Many believe that this case is going to stall in court, if it ever gets to that point. But didn't they say that about binding arbitration? When SB 400 was signed into law by then-Governor Gray Davis, local agencies filed suit, claiming that under Section 11, Chapter 11 of the California Constitution (we are paraphrasing here: no neutral private third

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party shall make financial decisions for a local government), binding arbitration was unconstitutional. And we know how the courts ruled in that case.

What Now?

The Orange County Employee Retirement System Board recently sought to move the case to Los Angeles County, noting that the lawsuit wouldn't be fairly tried in one of Orange County's own courtrooms. (Many court employees are members of the very retirement system that is named as a defendant in the case – courtroom sheriffs in charge of security). They claim that the law allows cases to be moved when the

dispute involves a county taking aim at another local agency.

As you can guess, the Orange County Board of Supervisors want to keep the case in town for obvious reasons and but publicly stated that the “retirement board was not entitled to select a preferred venue”. The case has also been assigned to Superior Court Judge Thierry Colaw, a then-Governor Pete Wilson appointee. Could this be a plus for the County's case?

Keep your eye on this case; it will be sure to cause many a' conversation around the water cooler.

A Few Bits About PERS

We comb through piles of PERS Board meeting materials, press releases, gossip, and other worthy sources to find out about things going on at PERS that you might find of interest. Following are a few highlights of recent news and events:

Election of President and Vice President

Unless there's a reason for a change, the annual board election of president and vice-president is typically just a rubber stamp process for the incumbents. The incumbent president, Rob Feckner, the representative of school employees, was reelected to another annual term in that position.

This year, however, with the retirement of the former retiree representative Bob Carlson, there was a vacancy for the position of vice president. Why should you care about the new vice president? For one, the person in that spot is the natural--although not automatic--successor to the sitting president. So, who was fingered for that position?

George Diehr, the state employee representative, was elected by the PERS Board to serve as its vice president. Dr. Diehr is a professor in the College of Business Administration at California

State University, San Marcos. He was first elected to the PERS Board in 2002, and currently serves as the Chair of the Health Benefits Committee and the Vice Chair of the Investments Committee.

He's a personable fellow, so don't hesitate to introduce yourself should you bump into him at any PERS functions.

New Board Members

On a related note, there are a few new faces on the PERS Board. The Legislature gets to appoint one member to the board, and legislative leaders recently picked Lou Moret, a Southern California political consultant and a long-time trustee of the Los Angeles Fire and Police Pensions Commission to fill that spot.

Moret was chief operating officer for 12 years at the Southern California Association of Governments, chief of staff to former Democratic Assemblyman Richard Alatorre, and the first director of the Office of Minority Economic Impact at the U.S. Department of Energy during the Carter administration. Interestingly, he's also a professional boxing referee. And no... that doesn't refer to his experience as a pension trustee.