Vol. 2010, No. 10 • October 2010
Michael C. Sullivan, Editor-in-Chief

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Does Labor Law Prevent Voter Initiatives To Control Pensions? The Coming Fight Between Core Democratic Principles and Traditional Labor Negotiation in the Public Sector

By Jonathan V. Holtzman and Ivan Delventhal

Introduction

One can scarcely open a newspaper these days without reading about the public sector pension crisis[1] and the increasingly urgent calls for pension reform.[2] Suddenly, the once-inscrutable intricacies of public pension systems have given way to public recognition of the catastrophic long-term financial commitments made by cities and counties across California.

In reaction, residents of several cities and counties have drafted, circulated and qualified for the November 2010

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[1] *See, e.g.*, Tom Abate, *Public Pensions Put State, Cities in Crisis*, S.F. Chron., July 25, 2010, at D-1, *available at* http://articles.sfgate.com/2010-07-25/business/21997365_1_pension-crisis-retirement-system-uniformed.

[2] *See, e.g.*, Michael Mishak, *Election 2010; Brown Details Plan for California State Workers' Pension Reform*, L.A. Times, July 23, 2010, at AA1, *available at* http://articles.latimes.com/2010/jul/23/local/la-me-brown-pensions-20100723; Tracy Seipel, *San Jose Council Takes Aim at Employee Salaries, Pensions*. San Jose Mercury News, Aug. 4, 2010, *available at* http://www.mercurynews.com/ci_15672528?source=most_emailed.

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A NOTE ON CITATION: The correct citation form for this publication is: 2010 Bender's Calif. Lab. & Empl. Bull. 337 (October 2010).

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ballot voter initiatives attempting pension reform.[3] These initiatives, and the legal challenges they are engendering,[4] highlight an important and unsettled legal question—specifically, whether Californians' extraordinary constitutional power of initiative[5] applies to matters that are also within the mandatory scope of bargaining under state collective bargaining laws. Put another way, may the voters withdraw from their elected policymakers the authority to reach agreements over certain matters within the scope of bargaining by making those decisions themselves? The answer to this question is especially critical in the context of pensions.

This article focuses on the coming fights over the validity of initiative measures affecting pensions, in the face of claims that they undermine collective bargaining obligations, and on how the inevitable legal battles may help clarify what role voters are permitted to play in setting other matters within the scope of bargaining.

The "Pension Tsunami" and Voter Efforts to Contain It

Public employee pensions are unique in that they are considered vested obligations. Such obligations outlive the city councils, boards of supervisors or elected officials that decide to confer or enhance them. For this reason, the temptation for elected representatives to grant these benefits, until very recently, has been great. From a political perspective, pensions were a "cheap" solution for cities and counties that lacked cash: while the cost in any one budget year appeared small, the benefit to employees was huge. This was especially true in the period when the stock market was booming and the California Public Employees' Retirement System ("CALPERS") was claiming that pension enhancements would be virtually free for ten or more years. In reality, the cost impact of pensions turned out to be enormous; in many jurisdictions, safety pensions will amount to 50 percent of covered wage. With the downturn in the economy and resulting decline in pension fund balances, public pension obligations are wreaking havoc on local government finances.[6]

The focus of this article is on a rare but intriguing approach to pension reform: efforts by the electorate itself to address the crisis directly through the initiative process. One controversial measure, the "Sustainable City Employee Benefits Reform Act,"[7] would require active San Francisco city employees to contribute more toward their pension and benefit costs—10 percent for police and fire employees, 9 percent for all others (they currently pay 7.5 percent). It would also require city employees to pay 50 percent of their dependents' health care coverage (they are currently required to pay 25 percent). Another initiative measure would restrict pension benefits for new Menlo Park city employees to those calculated under a "2 percent at 60" formula.

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3 *See, e.g.*, C.W. Nevius, Column, *Adachi Makes Enemies, Sense with Labor Proposal*, S.F. Chron., July 10, 2010, at C-1, *available at* http://articles.sfgate.com/2010-07-10/bay-area/21978073_1_city-workers-pension-city-hall.

4 *See, e.g.*, John Coté, *S.F. Unions Sue over Proposition B*, S.F. Chron., Aug. 11, 2010, at C-2, *available at* http://articles.sfgate.com/2010-08-11/bay-area/22213950_1_labor-unions-petitions-lawsuit; Bonnie Eslinger, *City Defends Right of Pension Reform Initiative*, Palo Alto Daily News, Aug. 5, 2010, at A-2, *available at* http://www.allbusiness.com/government/government-bodies-offices-regional/14893304-1.html; *see also* Gretchen Wenner, *Take Down that Ballot Measure, Police Union Says*, Bakersfield Californian, Aug. 4, 2010, *available at* http://www.bakersfield.com/news/local/x2120045983/Take-down-that-ballot-measure-police-union-says.

5 The rights of initiative and referendum have been described as articulating "one of the most precious rights of our democratic process." Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 591 (1976).

6 Report of the Civil Grand Jury of the City and County of San Francisco (June 2010) (giving the particular crisis a name: the "Pension Tsunami").

7 Proposition B, November 2, 2010 election.

Initiative measures of this kind face court challenges on the ground, among others, that they interfere with collective bargaining rights under the Meyers-Milias-Brown Act[8] ("MMBA")[9] or other state labor statutes.[10] The rejoinder to this claim is twofold: (1) the California Constitution provides that all power is reserved to the people and courts have held that the voters' constitutional right of initiative is to be "jealously guarded;"[11] and (2) in the case of charter cities and counties, the Constitution states that the voters have the "plenary" power to determine public employee compensation and to decide the powers they wish to delegate to elected bodies.[12]

Although the MMBA has been held to be a matter of "statewide concern,"[13] can the obligation to meet and confer—an obligation the Supreme Court has repeatedly described as "procedural"[14]—trump the substantive powers of local voters to determine compensation matters? While it is not clear how the courts will rule, the argument that the voters' powers must prevail is especially strong in the context of pensions, both because of the magnitude and vested nature of the obligation.

8 Cal. Gov't Code § 3500 et seq.

9 Indeed, the Menlo Park measure is already facing such a legal challenge. It should be noted that the authors of this article are representing the City of Menlo Park in this litigation.

10 The challenge to the San Francisco measure does not allege that the measure interferes with collective bargaining rights per se; it does note, however, in attacking the initiative on procedural grounds, that the measure would alter the Charter-mandated collective bargaining processes.

11 *See, e.g.*, Kopp v. Fair Political Practices Comm'n, 11 Cal. 4th 607, 662–63 (citing Raven v. Deukmejian, 52 Cal. 3d 336, 341 (1990)).

12 CAL. CONST., art. XI, § 7.

13 *See* Voters for Responsible Retirement v. Board of Supervisors, 8 Cal. 4th 765, 780–81 (1994).

14 People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach, 36 Cal. 3d 591, 597 (1984) (explaining that "[w]hile the Legislature [in enacting the MMBA] established a *procedure* for resolving disputes regarding wages, hours and other conditions of employment, it did not attempt to establish standards for the wages, hours and other terms and conditions themselves.") (emphasis added); County of Riverside v. Superior Court, 30 Cal. 4th 278, 288–289 (2003) (noting that in *Seal Beach*, the court recognized that the MMBA "merely imposed *procedural* requirements.") (emphasis added).

The Right of Initiative v. the MMBA

The California Constitution guarantees, among other fundamental rights, the right of the people in cities and counties to invoke the power of initiative, i.e., the power to propose legislation and to adopt or reject it.[15] This guarantee, as well as the rights of referendum[16] and recall,[17] the power of the people to "alter or reform [government] when the public good may require,"[18] and the provision that "all political power is inherent in the people,"[19] are the constitutional embodiment of the idea that power resides in the people, and that government must be accountable to its citizenry. Courts have consistently recognized the precious nature of these rights, and have analyzed challenges to them with a strong presumption in favor of the right of initiative.[20]

The MMBA, in turn, requires governing bodies and employee organizations to "meet and confer in good faith regarding wages, hours and other terms and conditions of employment."[21] Whether, in enacting the MMBA, the Legislature intended to divest the voters of the constitutional right of initiative on matters relating to bargainable issues is an open question. It is certainly true that, from the perspective of private sector labor relations, it would be considered an unfair labor practice for an employer to refuse to bargain over any matter within the scope of bargaining. Does this mean it is an unfair labor practice for the voters to deprive their representatives of the power to negotiate over the full range of benefits?

This issue goes to the very core of the extent to which the private sector model of collective bargaining can be imported to public employers, who are bound by various democratic principles that are not applicable to private employers.

The leading case in this area is *People ex rel. Seal Beach Police Officers' Association v. City of Seal Beach*,[22] which considered whether a city council was required

15 CAL. CONST., art. II, §§ 8, 11.

16 CAL. CONST., art. II, §§ 9, 11.

17 CAL. CONST., art. II, §§ 13, 19.

18 CAL. CONST., art. II, § 1.

19 CAL. CONST., art. II, § 1.

20 Fair Political Practices Comm'n. v. Superior Court, 25 Cal. 3d 33 (1979).

21 Cal. Gov't Code § 3505.

22 36 Cal. 3d 591 (1984).

to comply with the MMBA "meet-and-confer" obligation prior to placing on the ballot a measure that would amend the city charter to require the immediate firing of city employees who participated in strikes. The California Supreme Court concluded that the council was required to bargain with unions before proposing charter amendments affecting matters within the scope of representation. The court based this decision on the conclusion that the council's constitutional power to propose charter amendments must be harmonized with its statutory obligation to bargain. While the court noted in a footnote the "clear distinction between the substance of a public employee labor issue and the procedure by which it is resolved"[23]—emphasizing that the salaries of local employees were municipal affairs not subject to general laws, while the process for fixing such salaries was a matter of statewide concern subject to state law—the city's failure to bargain before placing the measure on the ballot was found to be fatal to the measure. In short, *Seal Beach* was a big win for state labor law at the expense of municipal home rule.

Seal Beach decided the *governing body's* duties when it proposed for consideration by the voters changes in working conditions. It did not address the right of the electorate to wield its initiative power as to these employment matters.

In 1994, the California Supreme Court moved closer to addressing this fundamental question. In that case, *Voters for Responsible Retirement v. Board of Supervisors*,[24] the Trinity County Board of Supervisors approved a memorandum of understanding with two employee organizations that provided, among other things, that the County would implement a "2 percent at 60" retirement program and pay the employees' retirement contributions. Citizens of the county submitted petitions calling for a referendum challenging the ordinance that effectuated the pension changes. The county declined to allow the referendum to go forward. In upholding the county's action, the court concluded that a basic purpose of the MMBA—resolving disputes regarding wages, hours and other terms and conditions of employment through negotiation of binding agreements—would be rendered "meaningless" if the governing board's ratification of such an agreement was subject to referendum.[25]

While at first blush the case might seem to resolve the question of whether the voters may by initiative alter pension obligations, it is important to remember that this case was "easy;" it involved an effort by the voters to overturn a ratified labor contract. Doing so would not only raise issues under the MMBA, but also under the Contracts Clause of the federal and state constitutions.

On the other side of the coin, the courts have long upheld the authority of a charter city to require voter approval of any "addition, deletion or modification" of employee benefits.[26] Significantly, more recent cases have suggested that although the procedural requirements of the MMBA may be a matter of statewide concern, they will be found preemptive *only* if their impingement on powers reserved to the cities or counties is "limited" and if they do not encroach on the substantive powers of charter cities and counties to determine compensation levels.[27] Plainly, a determination that the voters' right of initiative does not apply to public compensation matters would be far more than a "limited" invasion on the home rule power.

By the time this article is published, a number of trial courts will likely have weighed in on the question of whether the voters can address pension obligations through the initiative process. Those decisions may turn on numerous intricacies, including whether or not the cities involved are covered by charters or general law and the precise nature of the changes the voters are seeking. But the battle over this issue, which is certain to reach the California Supreme Court, will be waged for at least the next few years.

Conclusion

While there are likely to be many twists and turns in judicial decisions over the next few years, the ultimate outcome—at least in California—should be clear. The Constitution allows voters (at least in charter cities and counties) the "plenary" power to determine the compensation of employees and, also, perhaps more importantly, the authority to decide what powers to confer upon and withhold from their representatives. The MMBA requires the governing body to bargain in

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23 *Id.* at 600, n.11.

24 8 Cal. 4th 765 (1994).

25 *Id.* at 782.

26 United Public Employees v. City of San Francisco, 190 Cal. App. 3d 419 (1987). In *Voters for Responsible Retirement*, the court criticized, but did not overrule, the decision in *United Public Employees*, explaining that the decision had "understated the problematic nature of the relationship between the MMBA and the local referendum power." 8 Cal. 4th at 782.

27 County of Riverside v. Superior Court, 30 Cal. 4th 278 (2003); County of Sonoma v. Superior Court, 173 Cal. App. 4th 322 (2009).

good faith with respect to the matters it controls; it does not require that the voters give the governing body control over all matters. Put another way, if the voters in a charter city decide they wish to be the sole arbiters of decisions over matters such as pensions which vitally affect the long-term viability of the local government, it is hard to believe that a procedural meet-and-confer requirement applicable to local governing agencies can be found to have eaten the voters' constitutional powers whole. Even if the conclusion were otherwise, it simply does not make sense to exult a state *statute* governing procedures over powers reserved to the voters by the state *Constitution*. And, whatever the conclusion with respect to other wage and benefit-related issues, on the issue of pensions in particular, it makes perfect sense to allow voters a say in whether and to what extent they wish to be burdened by "legacy" costs stretching far beyond the lifespan of the politicians that grant them.

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