



F I L E D
Superior Court of California
County of San Francisco

OCT 05 2016

CLERK OF THE COURT

BY: *Alan Kim*
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 305

CITY & COUNTY OF SAN FRANCISCO;
BEN ROSENFELD, in his Official Capacity
as Controller,

Petitioners and Plaintiffs,

v.

RETIREMENT BOARD OF THE SAN
FRANCISCO EMPLOYEES RETIREMENT
SYSTEM; JAY HUIZH, in his Official
Capacity as Executive Director of the San
Francisco Employees Retirement System,
DOES 1 - 10,

Respondents and Defendants.

Case No. CPF-16-515266

**ORDER GRANTING PETITIONER'S
MOTION FOR PRELIMINARY
INJUNCTION**

Plaintiffs and Petitioners City and County of San Francisco and City Controller Ben Rosenfield in his official capacity (collectively, "Petitioners") moved for entry of a preliminary injunction against Defendants and Respondents Retirement Board of the San Francisco Employees Retirement System ("SFERS Board") and Jay Huish, Executive Director of the San Francisco Employees' Retirement System, in his official capacity ("Executive Director") (collectively, "Respondents"). Specifically, petitioners seek to enjoin respondents from (1) implementing the SFERS Board Resolution, dated July 13, 2016, which directs SFERS to pay supplemental COLAs to pre-November 6, 1996 SFERS retirees and

1 their beneficiaries; and (2) exempting the pre-November 6, 1996 retirees and their beneficiaries from the
2 “full funding” requirement in the Charter of the City and County of San Francisco, section A8.526-3(d).
3 The motion came on for hearing on October 4, 2016.¹ Non-party Protect Our Benefits’ (“POB”)
4 application for leave to file an *amicus curiae* brief in support of respondents’ opposition to the motion
5 also came on for hearing. Petitioners appeared by Linda M. Ross and Arthur A. Hartinger. Respondents
6 appeared by Ashley K. Dunning. POB appeared by David P. Clisham. Having duly considered the
7 matter, the Court grants POB’s application for leave to file an *amicus curiae* brief and petitioners’ motion
8 for preliminary injunction.
9

10 REQUESTS FOR JUDICIAL NOTICE

11 As a preliminary matter, the Court rules on the parties’ requests for judicial notice as follows:

12 Petitioners’ requests for judicial notice of the documents attached as Exhibits A – S and Exhibit
13 AA to Petitioners’ Request for Judicial Notice in Support of Ex Parte Application for Temporary
14 Restraining Order and Order to Show Cause Re Preliminary Injunction (“PRJN”) are granted pursuant to
15 Evidence Code sections 452(c), 452(d) and 452(h). Petitioners’ requests for judicial notice of the
16 documents attached as Exhibits T – Z to PRJN are granted but only as to their existence, and not as to the
17 truth of the matters asserted therein.
18

19 Respondents’ requests for judicial notice of the documents attached as Exhibits 1 – 3 to
20 Respondents’ Request for Judicial Notice in Support of Opposition for Temporary Restraining Order
21 (“RRJN”) are granted pursuant to Evidence Code sections 452(c) and 452(h).
22

23 POB’s requests for judicial notice of the documents attached as Exhibits A – C to POB’s Request
24

25 ¹ The Court was scheduled to hear argument on petitioner’s application for Temporary Restraining Order
26 on October 4, 2016. See Order Setting Hearing on Petitioners’ Application for Temporary Restraining
27 Order and Order to Show Cause Re: Preliminary Injunction, filed Sept. 21, 2016. At the hearing,
28 however, the parties advised the Court that at a September 21, 2016 hearing before the Honorable Harold
Kahn, Respondents agreed to suspend COLA payments to the pre-1996 retirees until at least October 4,
2016. Therefore, the parties deemed that hearing as the hearing on the Temporary Restraining Order. At
the October 4, 2016 hearing, the parties confirmed their understanding and agreement to proceed on the
motion for preliminary injunction.

1 for Judicial Notice in Opposition to Petitioners' Application for Temporary Restraining Order and
2 Preliminary Injunction ("POBRJN") are granted pursuant to Evidence Code sections 452(b) and 452(c).

3 SUMMARY OF RELEVANT FACTS

4 In the related action titled *Protect Our Benefits v. City & County of San Francisco* ("POB v.
5 CCSF"), the Court of Appeal held that San Francisco Charter section A8.526-3(d) (the "2011
6 amendment"), which imposed a "full funding" condition on the payment of supplemental COLA pension
7 benefits, cannot be applied to current employees or those who retired after the effective date of the 1996
8 initiative establishing the supplemental COLA ("post-1996 retirees") because such a condition impairs
9 those retirees' vested rights, but that the amendment may be applied to employees who retired before the
10 effective date of the 1996 initiative ("pre-1996 retirees") because those retirees do not possess the same
11 vested rights. (2015) 235 Cal. App. 4th 619, 628. Upon remand, this Court entered a judgment in that
12 case consistent with the Court of Appeal's ruling. See PRJN Ex. R, *POB v. CCSF*, CPF-13-512788
13 Judgment, filed Oct. 26, 2015.

14
15
16 Subsequently, as a result of POB's lobbying efforts before the SFERS Board to pay the
17 supplemental COLA benefits to pre-1996 retirees, the SFERS Board voted to adopt Board Resolution
18 2016-1, dated July 13, 2016 ("Board Resolution"), which directs SFERS to pay supplemental COLAs to
19 pre-1996 retirees and their beneficiaries notwithstanding the condition that the fund be "fully funded," as
20 required by the 2011 amendment. RRJN Ex. 1, Board Resolution 2016-1, dated July 13, 2016. By a
21 letter dated September 8, 2016, City Controller Rosenfield advised the Executive Director of the SFERS
22 Board of petitioners' position that respondents lack the authority to implement the Board Resolution.
23 Declaration of Ben Rosenfield ("Rosenfield Decl.") Ex. A, Letter to Jay Huish dated Sept. 8, 2016. The
24 letter further advised that, in the event respondents fail to reconsider the Board Resolution, petitioners will
25 seek a judicial determination as to the authority of respondents in this matter. Respondent declined to
26 reconsider its position, and accordingly Petitioners filed the instant Petition for Writ of Mandate
27
28

1 *supra*, 235 Cal.App.4th at 640. As such, the “full funding” condition imposed by the 2011 amendment
2 remains valid as to pre-1996 retirees, and must be upheld.

3 Rather than implementing the “fully funded” condition as to pre-1996 retirees, respondents voted
4 to adopt the Board Resolution, which directs SFERS to pay supplemental COLAs to pre-1996 retirees and
5 their beneficiaries regardless of whether the SFERS fund is “fully funded.” By its plain terms, the Board
6 Resolution contradicts the 2011 amendment, as previously interpreted by the Court of Appeal and this
7 Court in *POB v. CCSF*.

8 Respondents argue that they have the legal authority and fiduciary responsibility to determine that
9 the “full funding” condition should not be applied to pre-1996 retirees, notwithstanding the 2011
10 amendment and the outcome in *POB v. CCSF*. In support of their contention, respondents rely on Article
11 XVI, section 17 of the California Constitution, which grants the SFERS Board “plenary authority” to
12 administer the retirement system, as well as fiduciary duties to retirees and their beneficiaries. But
13 respondents agree that “[p]lenary authority...does [not] mean that the Board may contravene a
14 contradictory legislative mandate absent a judicial ruling that the legislative mandate is unenforceable.”
15 *Opp. p. 9; see also Bd. of Ret. v. Santa Barbara Cty. Grand Jury* (1997) 58 Cal.App.4th 1185, 1193.
16 Here, the 2011 amendment which imposed the “full funding” condition on payment of supplemental
17 COLAs is in fact a legislative mandate. *See* Cal. Const., art. XI, § 3(a) (“The provisions of a charter are
18 the law of the State and have the force and effect of legislative enactments”). Further, as stated
19 previously, the Court of Appeal affirmatively and explicitly held that the 2011 amendment is valid and
20 enforceable as to pre-1996 retirees. Because the Board Resolution would contradict clear legislative and
21 judicial mandates with respect to the 2011 amendment as applied to pre-1996 retirees, respondents lack
22 the legal authority to implement it.

23 For the reasons stated above, the Court concludes, based on the state of the evidence before it, that
24 petitioners are likely to succeed on the merits of their claim.

25 **B. The Balance of Interim Harm Tips in Petitioners’ Favor**

26 Petitioners have established irreparable harm to the City and its employees if a preliminary
27 injunction does not issue. Petitioners presented evidence that the costs of implementing the Board
28 Resolution include an estimated \$34 million in retroactive payments from SFERS to pre-1996 retirees for

1 the time period since 2012, a decrease in the value of the retirement fund by \$148 million, and an
2 estimated \$100 million going forward for the City. Rosenfield Decl. ¶ 8. Petitioners further contend that
3 these payments would potentially result in CCSF and its employees paying higher contribution rates. *Id.*
4 at ¶9. Respondents do not dispute petitioners' evidence of financial harm; rather, respondents argue that
5 any harm that might be suffered by petitioners is not irreparable. Specifically, respondents contend that
6 any overpayment of supplemental COLAs to pre-1996 retirees can be remedied by deducting such
7 amounts from future payments. Opp. p. 14. The Court finds, however, that respondents' proposed
8 remedy would create uncertainty and financial hardship to petitioners, who would have to expend
9 resources in recouping the overpayments, as well as to pre-1996 retirees and their beneficiaries, who
10 would likely receive decreased payments at some unknown future time. Moreover, the remedy proposed
11 by respondents does not address the financial harm petitioners will suffer based on the decrease in the
12 value of the fund.

13 Respondents argue that significant harm would inure to the pre-1996 retirees and their
14 beneficiaries who would continue to be denied supplemental COLA benefits in the average amount of
15 \$123 per month. Declaration of Jay Huish ("Huish Decl.") ¶ 7. Although the Court is sympathetic to the
16 financial and other hardships suffered by this particular group of retirees and their beneficiaries, this Court
17 cannot disregard the 2011 amendment or the decision of the Court of Appeal. For these reasons, the
18 Court is not persuaded, based on the evidence before it and the likelihood that petitioners will prevail on
19 the merits, that the balancing of interim harm weighs in favor of respondents.

20 CONCLUSION

21 Having found that there is a likelihood that petitioners will prevail on the merits of their claim, and
22 that the balance of the interim harm tips in petitioners' favor, the Court orders as follows:

23 1. The SFERS Board and its Executive Director, and any other person(s) acting in concert
24 with them or on their behalves, are enjoined from implementing the SFERS Board Resolution, dated July
25 13, 2016, which directs SFERS to pay supplemental COLAs to pre-November 6, 1996 SFERS retirees
26 and their beneficiaries unless the COLAs are fully funded as required by San Francisco Charter section
27 A8.526-3(d); and
28

1 2. The SFERS Board and its Executive Director, and any other person(s) acting in concert
2 with them or on their behalves, are enjoined from exempting the pre-November 6, 1996 retirees and their
3 beneficiaries from the "full funding" requirement in the Charter of the City and County of San Francisco,
4 section A8.526-3(d).

5
6 3. Petitioners shall serve a copy of this Order on Respondents, through their counsel, no later
7 than 5:00 p.m. October 6, 2016 by fax or email.

8 IT IS SO ORDERED.

9
10 Dated: October 5, 2016



Mary E. Wiss
Judge of the Superior Court

**Superior Court of California
County of San Francisco**

CITY AND COUNTY OF SAN FRANCISCO;
BEN ROSENFELD, in his Official Capacity as
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REIREMENT BOARD OF THE SAN
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CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, Sean Kane, a Deputy Clerk of the Superior Court of the County of San Francisco,
certify that I am not a party to the within action.

On October 5, 2016 I electronically served the ORDER GRANTING PETITIONER'S
MOTION FOR PRELIMINARY INJUNCTION via File&ServeXpress® on the recipients
designated on the Transaction Receipt located on the File&ServeXpress® website.

Dated: October 5, 2016

T. Michael Yuen, Clerk

By:



Sean Kane, Deputy Clerk