

**SUBMITTAL TO THE BOARD OF SUPERVISORS  
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**

131



**FROM:** Human Resources Department


**SUBMITTAL DATE:**  
March 21, 2011

**SUBJECT:** Pension Reform Analysis

**RECOMMENDED MOTION:** That the Board of Supervisors:

1. Receive and file the report from the Law Office of Hanson Bridgett, LLP (Attachment A);
2. Receive and file the report from Bartel Associates, LLC (Attachment B); and
3. Receive and file the report from Buck Consultants, LLC (Attachment C)

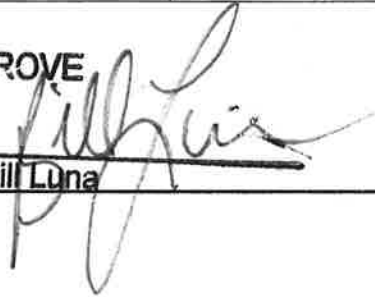
**BACKGROUND:** On September 14, 2010, the Board of Supervisors received pension reform reports from the Executive Office and the Pension Reform Advisory Committee (PRAC). The Board also approved the release of a Request for Proposal (RFP) to engage benefit consultants for advice on several issues related to pension reform: cost savings, benefit adequacy, legal issues and impact on recruitment and retention. The Board instructed the Executive Office to return with a specific action plan for pension reform.

  
 \_\_\_\_\_  
 Barbara A. Olivier  
 Asst. County Executive Officer/Human Resources Dir.

<b>FINANCIAL DATA</b>	Current F.Y. Total Cost:	\$ 0	In Current Year Budget:	Yes
	Current F.Y. Net County Cost:	\$ 0	Budget Adjustment:	No
	Annual Net County Cost:	\$ 0	For Fiscal Year:	2010/11

<b>SOURCE OF FUNDS:</b> N/A	<b>Positions To Be Deleted Per A-30</b>	<input type="checkbox"/>
	<b>Requires 4/5 Vote</b>	<input type="checkbox"/>

**C.E.O. RECOMMENDATION:**

**APPROVE**  
 BY:   
 Bill Luna

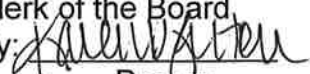
**County Executive Office Signature**

Consent  
 Policy  
 Consent  
 Policy

**MINUTES OF THE BOARD OF SUPERVISORS**

On motion of Supervisor Stone, seconded by Supervisor Benoit and duly carried by unanimous vote, IT WAS ORDERED that the above matter is received and filed as recommended.

**Ayes:** Buster, Tavaglione, Stone, Benoit and Ashley  
**Nays:** None  
**Absent:** None  
**Date:** April 4, 2011  
**xc:** EO, HR

Kecia Harper-Ihem  
 Clerk of the Board  
 By:   
 Deputy

**Prev. Agn. Ref.:** 02/15/11 - #3.39 | **District:** ALL | **Agenda Number:**

**1.0**

Departmental Concurrence

Dep't Recomm.:  
 Per Exec. Ofc.:

## BACKGROUND continued

On January 11, 2011, after the completion of the RFP process, the Board approved the retention of:

- Hanson Bridgett, LLP to provide expert legal advice on issues effecting implementation of pension reform.
- Bartel Associates, LLC to provide actuarial analysis of cost savings and benefit adequacy for pension design options.
- Buck Consultants, LLC to provide analysis on total compensation and the impact of pension reform on recruitment and retention.

A preliminary analysis was conducted with the three consultants, where all pension formulas currently available under CalPERS were considered, as well as modifications of the CalPERS formulas, defined contribution plans, cash balance plans, and several hybrid (combinations of defined benefit and defined contribution) plans. As a result, eight pension formulas for Miscellaneous employees and six formulas for Safety employees were identified as representative of a broad range of possible options.

The consultants have now completed their analysis and we have summarized key findings below.

### A. Legal Analysis (Attachment A):

The legal analysis focuses on the County's ability and limitations in changing the benefit formulas and structure of the pension plan, including vested rights of employees, changes or employee choices in CalPERS benefit formulas, possible amendments to the CalPERS law, withdrawal from CalPERS, and non-PERS options.

1. **Vested Rights:** The County can provide any reduced pension benefit (Tier II) to new employees that it negotiates or otherwise establishes, subject to CalPERS regulations. Vested rights for current employees become active upon acceptance of employment, and limit changes to benefit formulas for them unless a "comparable new advantage" is provided.
2. **PERS vs. Non-PERS benefits:** The Board of Supervisors may elect to amend the state law to provide a benefit formula not currently permitted by CalPERS, or the Board may elect to leave PERS. There are several amendments that we may wish to introduce to the legislature, but such changes would not be short-term solutions. It does not appear that vested rights limit the County's ability to withdraw from PERS. While there are several methods to withdraw, it requires cooperation from PERS, is likely to be expensive and time consuming, and may be legally challenged. Given the facts of this option, we do not recommend leaving CalPERS at this time. Note that this would result in eliminating the cash balance and hybrid options from current consideration.
3. **Cost sharing for optional benefits:** The possibility of shifting some of the cost of employer contributions to employees was also reviewed. Member (employee) contributions can be increased for part or all of the cost of optional benefits for future years. Optional benefits include formulas higher than 2% @ 60 for Miscellaneous and 2% @ 55 for Safety; and also include one-year final compensation instead of three-year final compensation. However, this type of cost sharing must be negotiated in a collective bargaining agreement. Also, for optional benefits already in place, member sharing of employer costs for optional benefits may not be tracked by CalPERS as employee contributions.

The legal analysis also includes a review of various court decisions and provisions of current PERS law, pointing out where flexibilities and challenges lie in regard to changing current pension options for County employees.

**B. Actuarial Analysis (Attachment B):**

Bartel Associates, LLC (Bartel) worked in collaboration with the Human Resources (HR) Department to identify a comprehensive range of CalPERS and non-CalPERS benefit plan options for analysis. Each option was actuarially analyzed by Bartel for estimated cost savings in the near and long term. Bartel evaluated each option against established benchmarks for retirement income adequacy given all sources of income. The effect of eliminating employer payment of employee contributions (referred to as "EPMC") was also analyzed by Bartel as a viable option with immediate budget impact. Below, we summarize Bartel's cost savings and retirement income adequacy analysis. We can draw the following conclusions from Bartel's analysis:

**1) Plan Formulas:**

- a) A number of alternate formulas are available through CalPERS and can be offered as a second tier to new employees. The available CalPERS options produce more pension cost savings than the non-CalPERS formulas studied, while providing more adequate post-retirement income.
- b) Defined Contribution plans can produce significant savings, but savings and retirement income adequacy depend on the level of employer and employee contributions as well as actual investment returns. The Defined Contribution formulas studied by Bartel were designed to provide a balance between County pension cost savings and retirement income adequacy, but did not produce as great a savings as alternate CalPERS defined benefit formulas nor sufficient retirement income to meet benchmark levels. Offering these plans would also require cooperation and agreement with CalPERS, and an amendment to the state law.
- c) A Hybrid 1.5% @ 65 defined benefit plan with a 3% supplemental defined contribution plan is permissible under CalPERS for Miscellaneous employees, but it produced lower cost savings than alternate CalPERS formulas and post-retirement income below generally accepted benchmarks. The low savings result is in part attributable to the formula's 2% required employee contribution set by State law, compared to the 8% employee contribution for the current plan.
- d) Individual election (Choice): Providing a choice between benefit plans for current employees has the potential to produce greater pension cost savings than a Tier II Plan for new employees only. However, CalPERS provides choice only to current Miscellaneous employees and only if the 1.5% @ 65 plan is offered. No choice option is permitted by CalPERS for Safety employees. Bartel found that while the potential exists for greater pension cost savings, post-retirement income will fall below generally accepted benchmarks unless voluntary employee contributions are boosted.

2. **Cost Savings:**

a. **Employer Paid Member Contributions (EPMC):** Currently, the County pays the employee contribution of 8% for Miscellaneous Members either immediately or after five (5) years of service, depending on collective bargaining agreements; for Safety Members, the County pays the 9% employee contribution generally after three (3) years of service. Elimination of the EPMC for all current employees would produce the greatest savings to the County, and has no impact on retirement income for most employees. Bartel estimates that the elimination of EPMC will result in \$59 million annual savings for Miscellaneous and Safety employees in the first year, and accumulate to \$344 million after ten years. If the County introduces this change gradually over two or three years, the savings would be \$19.7 million to \$29.5 million in the first year.

b. **Tier II for New Employees:**

i.) Introduction of a Tier II (lower benefit formula) for new employees yields relatively low savings in the first years of implementation but savings accumulate over time, and in the long term annual savings are significant.

- The 2% @ 60 plan yields the greatest savings for the Miscellaneous plan, with a \$2.4 million reduction in costs in year one, \$26.7 million in year ten, and a cumulative savings after ten years of \$153.6 million.

- The 2% @ 55 plan yields the greatest savings for the Safety plan, with \$0.56 million in year one, \$10.1 million in year ten, and a cumulative savings after ten years of \$55.2 million.

ii.) The range of savings as a percentage of compensation (of Tier II new employees) among the plan options that were reviewed is fairly narrow. For Miscellaneous Plan options, savings range from 2.9% for the Hybrid Plan to 4.7% for the 2% @ 60 Plan. For Safety, the range was from 3.9% for the 3% @ 55 Plan to 6.3% for the 2% @ 55 Plan.

c. **Individual Election (Choice):** Providing a choice for current employees between two plans has the potential to produce greater savings than a Tier II Plan for new employees only. However, PERS does not permit such a choice other than with the 1.5% @ 65 for Miscellaneous. Estimated cost savings to the County are contingent on assumptions regarding the number of current employees who would elect a Tier II benefit in return for lower required employee contributions. The Cash Balance Choice plan (Option #8 for Miscellaneous, page 26; Option #6 for Safety, Page 34) produces the highest savings overall for the long term, but would require legislative amendments and cooperation from CalPERS to implement. The County may want to consider this for future action, but it cannot be implemented in the near term.

3. **Retirement Income Adequacy:**

Bartel has used two benchmarks to evaluate the adequacy of pension benefits. The ratio of post-retirement income, when taking into account all sources of retirement income to pre-retirement income, is a generally accepted measure of pension benefit adequacy and is referred to as the Replacement Ratio. Bartel used a CalPERS study undertaken in 2001 (page 13) and an Aon Consultants/Georgia State study (page 16) undertaken in 2008 to measure pension income adequacy.

The Replacement Ratio for Safety Members is generally lower than Miscellaneous because employees in the Miscellaneous Plan participate in Social Security while Safety employees do not.

Personal saving rates, investment return, and overtime pay assumptions have also been used to calculate Replacement Ratios.

**Miscellaneous:**

- a. The 3% @ 60 benefit is the most valuable CalPERS formula. The 3% @ 60, 2% @ 60 and 2% @ 55 formulas all provide more post-retirement income than is needed according to the CalPERS and Aon/Georgia State Replacement Ratio benchmarks.
- b. The Hybrid benefit (option #4), the Choice benefit of 1.5% @ 65 with a 3% supplemental Defined Contribution plan (option #6), and the 12% Cash Balance Choice plan (option #8) provide less post-retirement income than required according to Aon/Georgia State but more than the CalPERS benchmark. Note that option #4 and option #6 are permitted by CalPERS, while option #8 is not. Retirement income can be boosted for these options with increased County contributions. However, the County would not realize any cost savings from this arrangement.
- c. The 12% Defined Contribution (DC) plan (option #5), and the Choice 12% DC plan (option #7), produce less post-retirement income than required according to both Aon/Georgia State and CalPERS. Note that these options are not permitted by CalPERS.

**Safety:**

- a. The 3% @ 50 benefit is the most valuable CalPERS Safety formula. Both the 3% @ 50 and the 3% @ 55 (Option #3) provide more post-retirement income than is needed according to CalPERS and Aon/Georgia State (Page 19 & 37).
- b. The 2% @ 50 (Option #2) provides less post-retirement income than is needed according to the Aon/Georgia State benchmark but more than the CalPERS benchmark.
- c. The 2% @ 55 (Option #4), Choice of 10% DC plan (option #5), and the 18% Cash Balance Choice plan (option #6) produce less post-retirement income than is needed according to both Aon/Georgia State and CalPERS.

Note that Safety formulas produce lower post-retirement income than Miscellaneous formulas, primarily due to the addition of Social Security Retirement Income for Miscellaneous employees. The income replacement analysis also takes into account assumed pre-retirement overtime pay of 4% for Miscellaneous and 6% for Safety (Overtime pay is not included for benefit calculation by CalPERS). To the extent the assumptions of pre-retirement overtime pay is reduced or eliminated, post-retirement income will reflect a higher replacement ratio. Also, note that personal savings have been factored into post-retirement income. To the extent employees increase participation in the Deferred Compensation program and save for retirement, their post-retirement income replacement ratio will improve.

**C. Recruitment and Retention Analysis (Attachment C):**

In order to determine the impact of alternate pension formulas on recruitment and retention Buck Consultants, LLC (Buck) conducted a Total Compensation analysis for a representative sample of job classifications. One hundred and eighty eight County classifications were identified covering approximately 11,063 employees or 62% of the employee population. For the purpose of the analysis job classifications were categorized into occupational groups based on the standards established by the Equal Employment Opportunity (EEO-1) Report Format plus three additional categories: Para-professional, Safety, and Medical employees and professionals.

Total cash Compensation was defined as: Base pay, employer paid health insurance, employer paid social security taxes, employer normal cost pension contributions and employer-paid employee contributions, paid time off, and employer contributions towards Other Post Employment Benefits (OPEB).

To reflect the regional job market, Buck used public sector data from the five contiguous counties for Total Compensation comparisons: Los Angeles, Ventura, San Diego, Orange, and San Bernardino. For executives, Buck used four additional counties which are closest to Riverside County in size: Alameda, Contra Costa, Sacramento, and Santa Clara. Private sector Bureau of Labor Statistics (BLS) data was also utilized for comparison. To reflect a more local job market, City of Riverside and City of Corona data were utilized specifically for clerical and Safety classification comparisons.

Buck's analysis shows that County employees are paid competitively compared to both private and public sectors. The table below shows rankings (Page 7):

<b>Occupational Group</b>	<b>Total Comp Ranking</b>
Executives	5 of 10
First/mid-Level Managers	8 of 11
Professionals	3 of 8
Paraprofessionals	4 of 7
Technicians	1 of 8
Skilled Craft Workers	5 of 8
Service/Maintenance	4 of 8
Safety Professionals	4 of 8
Administrative Support Workers	5 of 8
Medical Professionals	1 of 6

Buck results also show that approximately 54% of executives/senior management, 80% of first/mid level management and 78 % non-management job classifications rank in the top three of their benchmark group (summarized from Page 8).

Next, Buck assessed the impact on Total Compensation for six (6) Miscellaneous and four (4) Safety alternate pension options (page 12 and 13). The options were studied by Bartel for cost savings and benefit adequacy. Two Miscellaneous and two (2) Safety Choice options were eliminated from the Buck analysis because they were non-CalPERS options and appeared not to produce adequate post-retirement income compared to benchmarks.. Alternate pension options impact employee Total Compensation to the extent employer contributions and EPMC are reduced. Buck shows how the County's average Total Compensation ranking by employee category changes for each alternate pension option (page 14).

Average Total Compensation ranking drops by a relatively modest range of 0.7 to 1.6 when alternate pension options are assessed, as demonstrated in the chart below. Note that Executives and Senior Managers and First/Mid Level Officials and Managers are measured against nine (9) counties, other groups are compared to five counties. The table below shows current average rankings compared to alternate pension option #2 for Miscellaneous of the 2% @ 60 (no EPMC) formula and the Option #2 Safety of the 2% @ 50 (no EPMC) formula. Lower employer contribution rates are the primary factor in the drop in ranking of Total Compensation.

Occupational Group	Current Ranking (Public Sector)	Alternate Option #2	Drop in Rank
Executives	3.8	4.7	0.9
First/mid-Level Managers	2.9	3.8	0.9
Professionals	2.7	4.3	1.6
Paraprofessionals	2.7	4.1	1.4
Technicians	1.8	2.6	0.8
Skilled Craft Workers	3.0	4.0	1.0
Service/Maintenance	2.4	3.8	1.4
Safety Professionals	3.4	4.1	0.7
Administrative Support Workers	2.7	4.3	1.6
Medical Professionals	1.9	2.6	0.7

The drop in average Total Compensation rankings when alternate pension options are analyzed reflect a reduction in employee Total Compensation ranging from 5% to 9% for Miscellaneous employees and 6% to 10% for Safety employees (page 14 & 15). Note that in the event an alternate pension option Tier II for new employees is adopted the reduction in Total Compensation will only be for new employees.

Buck notes (page 59) that the private sector over the past 35 years has moved away from Defined Benefit to Defined Contribution plans and (page 16) that, "it is fair to say that any changes in pension formula considered by Riverside County, although not as rich as previous pension formulas, will be perceived as positive by applicants. The trend away from defined benefit programs in the private sector will assist in ensuring that a defined benefit program - even with a reduced formula - is a significant positive factor in recruiting." And on page 17, "Changing pension formulas is not likely to have a significant impact on Riverside County's ability to attract applicants and retain current employees."

Finally, the Buck report analyzes the current economic environment and compares Riverside County's tax base and average tax bill with the surrounding counties (Page 31). The report notes, "Riverside County has the dubious distinction of having the worst affected tax roll among the largest 12 counties in California, dropping 10.9% in 2009 and 4.58% in 2010."

**D. Conclusions:**

Based on the totality of these expert analyses, eliminating part or all of the Employer-Paid Member Contributions (EPMC) would result in the largest immediate reduction of County costs. Because the various EPMC conditions were negotiated as part of each collective bargaining unit's Memorandum of Understanding (MOU), this change can be implemented through the bargaining process, including possible "reopeners" for those unions that are not currently active in the bargaining process.

Implementation of a second tier of pension benefits within CalPERS for new employees would address long-term savings. This would require an amendment to our agreement with CalPERS, and would be subject to their requirements for implementation. Please note that a second tier must also be applicable to all Members within a plan (Miscellaneous Plan or Safety Plan), and cannot vary by bargaining unit.



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March 25, 2011

Barbara A. Olivier, SPHR  
Assistant County Executive Officer  
Human Resources Director

Shawn Atin, CEBS, SPHR  
Assistant Human Resources Director

County of Riverside  
County Administrative Center  
4080 Lemon Street  
Post Office Box 1569  
Riverside, CA 92502-1569

Re: Pension Reform

Dear Ms. Olivier and Mr. Atin:

This letter discusses options for changing the retirement benefits that currently are provided to County employees through CalPERS ("PERS").

The letter is organized as follows: short summary of conclusions, facts, issues, discussion of governing rules, and the application of governing rules to options that are being considered by the County. A number of options are discussed together because the legal principles apply equally to all of them.

## **A. SUMMARY OF CONCLUSIONS RE OPTIONS AVAILABLE TO THE COUNTY**

### **1. New Employees - Benefit Formulas and Structure**

No Vested Rights -- The County can provide any benefits to new employees that it negotiates or otherwise establishes, subject to PERS rules. There are no "vested rights" restrictions on benefits provided to new employees.

Lower Tier and Lower Optional Benefits -- Usually, changes in benefits for a PERS agency take the form of a lower tier formula and few if any optional benefit enhancements such as one year final compensation instead of average three years final compensation. John Bartel, the actuary engaged by the County, has evaluated several alternative formulas.

PERS and Non-PERS Benefits -- PERS benefits are structured as standard defined benefits, with the retirement allowance based on a formula of [final average compensation] times [years of service counted for PERS benefits] times [a pension formula]. The County is interested in



other structures, such as a cash balance plan, a combination of defined contribution and defined benefit plan, and also defined benefit formulas that are not now available under PERS. For some of these benefits, the County either would have to obtain an amendment of PERS law or would have to withdraw from PERS. Options are discussed below.

Choice of Benefit Formulas -- The County may wish to give employees the choice between benefit formulas, so some could elect higher benefits with higher employee contributions and some could elect lower benefits with lower employee contributions. The IRS has interpreted federal income tax rules to restrict choice when employee contributions are made on a pre-tax basis; however the IRS is re-examining this restriction and may issue a modified rule later this year. Separately, as discussed below under current tax law there is more opportunity for individual choice involving pre-tax employee contributions for new employees than for current employees. Additionally, as discussed below, if contributions to PERS are made on an after-tax basis by all employees who are given individual choice of benefit formulas and contribution levels, this should avoid the income tax restriction.

One provision of PERS law seems to allow the County to contract with PERS to give new employees the choice between a low and high benefit formulas and corresponding low and higher employee contributions. As discussed below, there is a reasonable argument that this provision is still available, but this should be confirmed with PERS. Otherwise, PERS law does not seem to allow choice, which might lead the County to consider requesting a change in PERS law or withdrawing from PERS.

## **2. Current Employees -- Benefit Formulas and Structure**

Vested Rights Limit Ability To Change -- Under generally accepted vested rights rules, it is very difficult to change the benefit formulas that apply to current employees. The courts have set out the rules for change, and one guiding principle generally is that reductions in benefits must be accompanied by "comparable new advantages".

Lower Tier and Lower Optional Benefits -- New theories of vested rights have been developed which would allow reductions in benefit formulas to a lower tier for current employees for future service. If the County wanted to act on these theories, most likely it would soon become involved in substantial, time-consuming, and expensive litigation with uncertain prospects for success.

Even under current views of vested rights, however, it should be possible to increase member contributions for "optional benefits" for future years, if bargained. An example is for members to pay the additional cost of one year final compensation compared to the cost of 3 years' average compensation. Another example is the additional cost of a benefit formula that is higher than the cost of 2% at 60 for miscellaneous members or 2% at 55 for safety members. PERS appears to take the position that the cost charged to members may increase but the benefit level cannot be reduced to the lower level. (However, see the discussion below regarding individual choice.) This type of change is not risk-free, as discussed below.

PERS and Non-PERS Benefits -- Current PERS law does not allow new benefit structures such as some of the benefit formulas that the County is evaluating or a cash balance plan. To

provide these benefits the County either would have to obtain an amendment of PERS law or would have to withdraw from PERS. Options are discussed below. With any withdrawal, however, current employees would have to be provided at least their existing benefits, or changes would have to fit within the limits established under vested rights. It does not appear that employees have a vested right to be in PERS, but only a vested right to receive benefits promised. Therefore it does not appear that withdrawal from PERS is limited by vested rights though it also does not appear that this issue has been decided by the courts.

Choice of Benefit Formulas -- It should be possible to avoid vested rights issues for current employees if they are individually given the choice between benefit formulas so, e.g., some could elect higher benefits with higher employee contributions and some could elect lower benefits with lower employee contributions. The IRS has interpreted federal income tax rules to restrict choice when employee contributions are made on a pre-tax basis; however the IRS is re-examining this restriction and may issue a modified rule later this year. Separately, as discussed below, if contributions to PERS are made on an after-tax basis by all employees who are given individual choice of benefit formulas and contribution levels, this should avoid the income tax restriction.

One provision of PERS law seems to allow the County to contract with PERS to give current employees the choice between a low and high benefit formulas and corresponding low and higher employee contributions. As discussed below, there is a reasonable argument that this provision is still available, but this should be confirmed with PERS. Otherwise, PERS law does not seem to allow choice, which might lead the County to consider requesting a change in PERS law or withdrawing from PERS. We have found no other provision in PERS law that allows individual choice by current employees between benefit formulas.

## **B. BACKGROUND FACTS**

### **1. Current PERS Retirement Benefits**

Currently County employees have the following PERS benefits

- Miscellaneous employees (generally): 3% at 60 if employed on or after 7/11/2002 [PERL 21354.3], each formula based on highest 12 months of compensation [PERL 20042].<sup>1</sup>
- Safety employees (generally): 3% at 50; based on highest 12 months of compensation [PERL 21362.2].
- Relevant optional provisions: various PERL sections defining county peace officer; PERL 21624 and 21626 [post-retirement survivor allowance]; pre-retirement "option 2" death benefit for safety members [PERL 21548]; military service credit as public service [PERL 21024]; 2 years additional service credit [PERL 20903]; public service credit for Peace Corps, AmeriCorps [21023.5]; indexed level of 1959 survivor benefits [PERL 21574.5].

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<sup>1</sup> The PERL is the California Public Employees' Retirement Law, embodied in the Government Code.

## 2. Options Being Considered

The County is considering a number of different benefit options including some that are available under PERS currently, some that are similar to but not the same as the ones currently available under PERS, and some that are not similar to PERS' benefits such as a "cash balance" plan. The report of the County's actuary, John Bartel, describes these options in detail.

### C. ISSUES

1. What are the governing rules that facilitate or create hurdles for change under the California Constitution, PERS Law (the "PERL"), and federal and California income tax law?
2. Considering options for change that County staff have identified as potentially of interest:

What are the legal risks involved in each option?

What actions can be taken to mitigate or avoid these risks, including possible changes in the PERL and federal tax law?

### D. DISCUSSION - GOVERNING RULES

#### 1. Summary

- "Vested rights" rules substantially limit changes that the County can make in pensions for current employees. They do not limit the pension benefits for new employees. However, there are opportunities under the vested rights rules for changes in pensions for current employees.
- PERS law includes a special provision for Riverside County to offer choice of high/low benefit formulas to all employees with corresponding high/low employee contributions. It is not clear how this provision currently applies, as discussed below. There are opportunities for changes in current employees' pensions and moving out of PERS if the PERL cannot be changed to meet the needs of the County.
- Federal and California income tax law currently restrict the ability for the County to offer individual choice of benefit options when employee contributions are made on a pre tax basis. That restriction is currently under review by the IRS. Also, there are opportunities to provide individual choice of benefit and employee contribution levels within existing law.

#### 2. Vested Rights

##### a. Vested Rights, in General

Generally, California public sector employees have a right to the retirement benefit (including the formula and other methods of calculation) promised to them during their employment with a

Ms. Barbara Olivier  
Mr. Shawn Atin  
County of Riverside  
March 25, 2011  
Page 5

public agency.<sup>2</sup> This rule is known as employees having "vested rights" in their pensions. The right accrues on an employee's acceptance of employment, although the particular amount of benefit may not be earned or become nonforfeitable until a later date.<sup>3</sup>

"Vested rights" is a constitutional rule and is based on the contract clause of the Constitution which forbids the State or any local public agency from interfering with the terms of a contract.<sup>4</sup> Therefore the terms of the contract determine what rights are vested and what are not and the terms of the contract must be carefully reviewed to determine what vested rights exist.

Generally, the California courts have held that protected pension benefits which are "vested" can be changed before an employee retires if all of these criteria are met: (i) The change is made for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and to maintain the integrity of the system. (ii) The change "must" be reasonable. (iii) The change "must" bear a material relation to the theory of a pension system and its successful operation. (iv) Changes which result in disadvantage to employees "should" be accompanied by comparable new advantages.<sup>5</sup> The courts decide whether these conditions are met.<sup>6</sup>

b. Rights Are Only "Vested" as Provided by the Contract

If the terms of the contract, which include the governing rules of the retirement system, state that the benefit level can be changed, then any rights affected by those terms are subject to change. For example, this is the case for employee contributions.

In the San Diego firefighters case,<sup>7</sup> the pension system increased the employees' contributions pursuant to recommendations by its actuary. The employees sued and claimed they had vested rights to the lower contributions. The California Supreme Court held that in this situation there were no vested rights in the lower employee contributions because the terms of the pension system itself -- the contract -- provided that employee contributions could be increased based on the actuary's recommendation.<sup>8</sup>

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<sup>2</sup> See, e.g., *Allen v. City of Long Beach*, 45 Cal. 2d 128 (1955).

<sup>3</sup> *Kern v. City of Long Beach*, 29 Cal. 2d 848, 853, 855 (1947).

<sup>4</sup> Most California cases are decided under the California constitution but some have also been decided under the Federal constitution. California Constitution Article I, section 9; Federal Constitution Article I, section 10, clause 1.

<sup>5</sup> *Allen*, 45 Cal. 2d at 131. Please note the difference between the "must" conditions and the "should" condition. To our knowledge, the courts have not explored this difference. There are not many court decisions on changes that are accompanied by comparable new advantages. One of the more interesting cases is *Claypool* where unfunded benefits were eliminated and funded benefits were substituted. See *Claypool v. Wilson*, 4 Cal. App. 4th 646 (1992).

<sup>6</sup> *Allen*, 45 Cal. 2d at 131.

<sup>7</sup> *Int'l Ass'n of Firefighters, Local 145 v. City of San Diego*, 34 Cal. 3d 292 (1983).

<sup>8</sup> Other court decisions have followed *Int'l Ass'n of Firefighters, Local 145* and made clear that if the contract that establishes a pension benefit allows a change in that benefit, then rights that otherwise might be vested and unchangeable can be changed to the extent provided in the contract. See, e.g.,

Therefore, to determine if any rights are vested, the term so the contract that provide County employees with PERS benefits must be analyzed.

c. New Theories Are Challenging Existing Interpretations of Vested Rights

New theories recently have been discussed that challenge existing interpretations of vested rights. One theory is that the courts have not, in fact, held that an employee is vested for the length of his/her working career with an agency in a pension formula.<sup>9</sup> Instead, what the courts have held is that an employee is vested in the benefits earned to any date of change, and no more. For example, if to the date of change the employee had accrued a pension of \$1,000/month beginning at age 55 under a 2% at 55 formula, nevertheless the formula could be changed to, e.g., 2% at 60 for his/her pension accruals all future service. This is the ERISA rule for private sector retirement plans.<sup>10</sup>

A second theory is that vested rights are established by contract and for the most part contracts between agencies and their employees are established by collective bargaining and set down in MOUs. To the extent that benefits are established by MOUs, the theory is that benefits can be changed for future service by bargaining under new MOUs. Using the same example, an agency could bargain for employees to accrue pension benefits under a 2% at 60 (instead of the prior 2% at 55) formula for future service if this is agreed upon in collective bargaining.

We have these comments. It appears that a pure application of the ERISA rule is a stretch of existing case law.<sup>11</sup> It is possible that the courts could reach this conclusion, but most likely it would require the California Supreme Court to reverse or substantially distinguish prior decisions.<sup>12</sup> The collective bargaining theory fits somewhat better with existing case law that vested rights are established by contract. However, the California Supreme Court has said that a vested pension right is an individual right<sup>13</sup> and this decision would have to be reconciled with a conclusion that collective bargaining can reduce pension benefit accruals for future service for all members of the bargaining unit. Moreover, it is highly likely that if either or both of these theories were used in developing new retirement benefits they would be challenged in litigation, the litigation could draw "amici" perhaps on both sides of the vested rights argument, and the litigation could be costly and take a long time to resolve, with uncertain prospects for success.

d. Vested Rights Are Contractual and Contracts Can Be Modified by Mutual Consent

A right is "vested" because if the public agency were to change it, unilaterally, this change would be an impairment of contract, forbidden by the Constitution. There is no "impairment" of contract if the parties both agree to a change. We are not aware of any court decision or other

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Walsh v. Bd. of Admin., 4 Cal. App. 4th 682 (1992). See also 70 Op. Cal. Att'y Gen. 214 (1987) (state legislator's pension).

<sup>9</sup> More specifically, in the highest and most favorable formula for the employee.

<sup>10</sup> I.R.C. § 411(d)(6).

<sup>11</sup> See, e.g., Pasadena Police Officers Ass'n v. City of Pasadena, 147 Cal. App. 3d 695 (1983).

<sup>12</sup> See, e.g., Allen v. City of Long Beach, 45 Cal. 2d 128 (1955).

<sup>13</sup> See, e.g., Abbott v. City of Los Angeles, 50 Cal. 2d 438 (1958).

formal guidance on this principle, most likely because it is a fundamental principle of contract law.

Under this principle, individual employees can choose their existing benefits or can choose another benefit that is offered. It appears that this choice can be extended to existing employees without adversely affecting any vested rights as long as the choice is real and not coerced in any manner.

Existing PERS law provides that current employees of the County may choose between high and low benefits (and corresponding high and low employee contributions)<sup>14</sup>. It is not clear how this provision currently applies, as described below. We have not been able to find any other provision in the PERL that allows current employees to choose between high/low benefit formulas with corresponding high/low employee contributions.

e. There Does Not Appear to Be a Vested Right in Any Particular Retirement Plan

We have found no law on this particular point but it appears that a vested right exists for benefits, not to a particular source of benefits. Therefore, for example, if the County were to establish its own retirement system and there was a transfer of all assets and liabilities for benefits currently held by PERS to that system,<sup>15</sup> it does not appear that this should violate any vested rights as long as there are no other fundamental changes in the benefits. The PERL includes provisions that allow such a change and it appears that at least some were enacted after current employees earned benefits under PERS.<sup>16</sup>

There may be limits to this type of change, however. For example, if there were a material change in the funding status of the benefits on such a change, the courts might rule that this violated vested rights to a funded pension.<sup>17</sup> As far as we can determine the courts have not ruled on this issue so we cannot predict the outcome of litigation.<sup>18</sup>

**3. PERS LAW -- The PERL**

The PERL sets out the terms of the contract that establish retirement benefits for County employees and therefore establish vested rights. The County's contract with PERS incorporates by reference all provisions of the PERL. Key provisions for this analysis are summarized below.

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<sup>14</sup> PERL 20550 et. seq.

<sup>15</sup> See below for a discussion of this type of change.

<sup>16</sup> E.g., PERL §§ 20586 - 20591.

<sup>17</sup> See Valdez v. Cory, 139 Cal. App. 773 (1983) (vested right in no "severe impairment" of funding of pension plan).

<sup>18</sup> Under the rule that following the terms of the contract is not a cutback of vested rights, if the County were to take advantage of long-existing provisions in the PERL - discussed below - any vested rights issue on a change of retirement plan should be much smaller.

**PERL 20550 et Seq. -- Special Riverside County elective provisions --**

A special election is available to current miscellaneous members who are employees of Riverside County "on the day immediately preceding the effective date of a contract amendment entered into pursuant to [Article 4 of the PERL]".<sup>19</sup> There does not seem to be a time limit on the County entering into such a contract with PERS. Also, the ability of the County to enter into such a contract does not appear to be a one-time only option. Instead, it appears from the words of the PERL that the County could enter into this type of contract with PERS at any time and time after time. Therefore, the County may have contracted with PERS for these provisions at an earlier time and amended the contract later to eliminate the provision and still be able to contract again for it. Additionally, this provision can only become effective after agreement under an MOU<sup>20</sup>. If the County is interested in this option it should obtain PERS' position with respect to the ability of the County to use this provision now.

Under Section 20550 et seq the following happens:

- Current employees covered by Social Security may choose between formulas providing 2% at 60 and 1.5% at 65 and 2.418% at 60. If 1.5% at 65 is chosen, then the employee contribution is 2% of compensation.
- Current employees may make an irrevocable election to "be subject to the benefits provided for in this article" during an annual 120 day open enrollment period determined by the County.
- New employees are automatically covered by 2% at 60 but may elect 1.5% at 65 or 2.418% 60 during an annual 120 day open enrollment period for all future service.
- Anyone who elects 1.5% at 65 may elect 2% at 60 or 2.418% at 60 on attaining 10 year of credited service with the County. This election is irrevocable.

**PERL 20475 -- Reduction of Benefits for New Hires --**

Benefits can be reduced for future service if (i) the benefits are the same for all members in a classification and (ii) the reduction applies only to new members. A contract with PERS can make this amendment only once in any three-year period for each classification.

**PERL 20479 -- Same Benefits for All Members in a Classification --**

No contract or contract amendment with PERS shall provide retirement benefits for some but not all members in stated classifications, which are essentially local

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<sup>19</sup> These provisions were added to the PERL in 1986 and amended in 1995.

<sup>20</sup> It is not clear if an agreement with one union under one MOU is sufficient to allow the provision to apply to all miscellaneous members or only members of that union.

miscellaneous members and also specified categories of safety members. No contract or contract amendments shall provide different retirement benefits for a subgroup including but not limited to bargaining units or unrepresented within those classifications. "Benefit" is broadly defined.

**PERL 20516 -- Cost Sharing - Optional Benefits --**

An agency and its employees may agree to share the costs of any optional benefit that is inapplicable to the agency until the agency elects to be subject to the benefit. The agreement shall specify the exact percentage of member compensation paid toward current service cost of the benefits. The member contributions are treated as normal contributions and added to their member accounts in PERS. Contributions shall be uniform for all members within stated classifications (essentially the same as in 20479). This section does not apply to an optional benefit elected before January 1, 1979. Subsection (f) of 20516 states that "nothing in this section shall preclude" an agency and its employees from "independently agreeing" in an MOU to share the costs of "any" optional benefit, or when first contracting with PERS "any benefit" in a manner "inconsistent with this section". However an agreement under Section 20516(f) is not part of the agency's PERS contract.<sup>21</sup>

**PERL 20532 -- Employer Contributions --**

"The contracting agency shall make the contribution for its employees" as determined by PERS.

**PERL 20502 -- Mandatory Inclusion of Employees in a PERS Classification --**

A contract with PERS "shall include in this system" all firefighters, police officers, county peace officers, local sheriffs and other employees of the contracting agency except as agreed to by the agency and PERS. Non-safety employees may be excluded based on "groups of employees such as departments or duties and not on individual employees". Groups may be excluded for newly hired employees. PERS may disapprove of a group exclusion if it decides this could adversely affect the system. This section "shall not be construed to supersede Sections 20303 and 20305."

**PERL 20303 and 20894 - Mandatory Exclusion from PERS --**

Employees who "are members of any other [public] retirement or pension system" who are "receiving credit" under that system "for service" are, "as to that service, excluded

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<sup>21</sup> PERL 20516(a) can be read to state that cost sharing of these benefits is limited to newly elected optional benefits. PERS representatives have not been consistent in interpreting this part of the PERL. Some PERS representatives have publicly stated that PERS allows cost sharing for pre-existing optional benefits under 20516(a) and not just under 20516(f) but other PERS representatives have said that cost sharing for pre-existing optional benefits can only occur under 20516(f). PERS requires a vote of a majority of the membership classification for a 20516(a) cost sharing. What is an optional benefit is established by contract with PERS; PERS also publishes a list of optional benefits.



from this system." Exceptions are made for (i) deferred compensation plan participation, (ii) money purchase plan participation if the plan has an IRS ruling that it is tax qualified, and (iii) another defined benefit plan but only if the plan has an IRS ruling that it is tax qualified, PERS is designated as the agency's "primary plan for the person", and participation in the other plan does not "interfere with" the person's rights to a PERS benefit. As noted above, Section 20502 requiring mandatory inclusion states that it does not supersede section 20303.

**PERL 20570 et Seq. -- Termination from PERS --**

20570, 20571 -- Termination -- If the contract with PERS was by ordinance or resolution, a two-thirds vote of the Board of Supervisors is required for termination. If the contract was by vote of the electorate, a majority vote of the electorate is required for termination.

20573, 20574, 20575 -- Terms and conditions -- PERS may negotiate the terms and conditions of termination and the payment of unfunded liabilities. The agency is liable for "any deficit in funding for earned benefits, interest, and collection costs; PERS has a lien on agency assets for these amounts. PERS may negotiate with the agency for funding the cost of final compensation.

20576 -- Single pooled account -- All assets and liabilities of terminated agencies are held in a single pooled account.

20580 -- Continuation of membership -- On termination, all memberships in PERS continue to the extent there are accumulated contributions to the credit of the member. The member's status continues as if the agency had not withdrawn.

**PERL 20585 -- Spin off from PERS to other retirement system --**

PERS can agree with an agency and the board of supervisors of a county "for termination" from PERS and "inclusion" of the agency's employees in the county system. The agreement "shall" provide for transfer of assets to the county system. Also "all liability" of PERS with respect to members and retirees under the contract "shall cease and become a liability of the county system ". Members generally are treated as members of the county system *ab initio*.<sup>22</sup>

**PERL 20281.5 -- Defined contribution plan for first two years for State employees --**

New State miscellaneous or industrial employees do not accrue PERS service credit for the first 24 months but instead contribute 5% of their compensation to a defined contribution (DC) plan. After two years they start accruing benefits under PERS. After four years they may transfer the funds in the DC plan to PERS to "buy back" the first two

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<sup>22</sup> PERL 20586, 20587 and 20588 set out special provisions for particular spinoffs to county systems. PERL 20589 sets out rules for spinoff to the San Francisco City and County Retirement System. PERL 20590 and 20591 set out rules for other spin-offs to city systems.

years of service credit, or the funds will be transferred to a 401(k) plan maintained by the State.

**PERL 20461 -- Benefits not specifically authorized by the PERL --**

PERS may "refuse to contract with, or to agree to an amendment proposed by" an agency for any "benefit provisions" that are "not specifically authorized by" the PERL and that PERS determines would "adversely affect" the system.<sup>23</sup>

**4. Income Tax Laws and Individual Choice Between Benefit Formulas**

a. Individual Choice, Vested Rights and Current Employees

If the County is interested in changing the benefit structure or level of benefits for current employees, vested rights present a hurdle. The County's options are then to (i) provide "comparable new advantages" for current employees, which could be costly and will be subject to review by the courts, with potentially an uncertain outcome, (ii) follow one or both of the new theories that challenge existing concepts of vested rights and be prepared to litigate, or (iii) give current employees an individual choice between the current and new programs.

Individual choice is the easiest path to avoid vested rights issues. For example, if choice were available under PERS<sup>24</sup> or another retirement structure, current employees could choose lower member contributions and lower benefits or higher contributions and higher benefits. Other, possibly more interesting, choices could be made available to employees as discussed below. However, individual choice has potential federal and California income tax issues.<sup>25</sup> These issues exist because currently employee contributions to PERS are made on a pre-tax (also called tax-deferred) basis.

b. The IRS Position On Taxation of Employee Contributions With Choice

Generally, the IRS takes the position that if an individual has the choice between (i) higher current cash compensation (lower member contributions) and lower retirement benefits, or (ii) lower current cash compensation (higher member contributions) and higher retirement benefits, each person who has this choice will be taxed as if he/she chose cash.<sup>26</sup> Generally, this is a rule of "constructive receipt". There are a number of exceptions to constructive receipt. With respect to retirement benefits, the IRS position is that a choice between low cash in pocket/high benefits and high cash in pocket/low benefits can only retain tax deferral for employee contributions if there is a statutory basis for the tax deferral. The statutory basis can only be, says the IRS, under Internal Revenue Code ("I.R.C.") Sections 401(k), 403(b), or 457.<sup>27</sup> None

<sup>23</sup> This is peculiar. By implication it appears to allow PERS to agree to provisions outside the PERL.

<sup>24</sup> Except for the limited provision for Riverside County in Sections 20550 et seq, it does not appear that PERS law allows individual choice between benefit formulas for current employees.

<sup>25</sup> California follows federal tax law in these matters.

<sup>26</sup> See, e.g., Rev. Rul. 75-539.

<sup>27</sup> That is - it can only work under a 401(k) plan, a tax sheltered annuity under 403(b) or a deferred comp plan under 457. PERS is not any of these. There also can be a choice between retirement benefits and

of these exceptions apply here for current employees because PERS is not covered by any of these I.R.C code sections.<sup>28</sup>

c. The IRS Position On Taxation May Change

Employee contributions to PERS currently are tax deferred under I.R.C. Section 414(h)(2) as tax "pickups". There is substantial controversy about whether there can be tax-deferred member contributions under section 414(h)(2) if the member has individual choice about the amount of the contributions. The IRS has ruled that these contributions are not tax-deferred.<sup>29</sup> That ruling is currently being questioned in administrative proceedings by several organizations.

We have recently talked with both IRS and Treasury staff about the status of these proceedings. It is clear that IRS and Treasury understand the economic and legal difficulties of state and local agencies with respect to pension costs and that they understand that allowing individual choice between high benefits/high contributions and lower benefits/lower contributions may help resolve these difficulties. However they also must work within the limits of proper tax policy. We also have recently talked with individuals who are directly involved in discussions with IRS and Treasury on the issue of individual choice. They are moderately optimistic that there will be a change in policy.

Our assessment is that there is, in fact, a moderate chance that IRS and Treasury will ease the rules in some manner to allow current employees to choose between high benefits/high contributions and lower benefits/lower contributions. A change may come sometime later this year. It also may be limited in scope.

d. Until IRS Changes Its Position The County Would Be At Risk For Taxation

Unless there is a change in the current tax rules, there is a material tax risk for the County if it allows current employees to choose between high benefits/high contributions and lower benefits/lower contributions and make the contributions on a tax-deferred basis. The IRS would likely take the position that employees are taxable on the value of their contributions. Also, the IRS would likely focus on the County for failing to properly withhold and pay income and other payroll taxes and seek to collect these amounts from the County. Therefore, unless the IRS changes its position the County is at risk if it allows choice of benefit and contribution level on a pre-tax basis.

Note that there would not be such a risk if the choice is only given to new employees and they make a one time irrevocable election between high benefits/high contributions and lower benefits/lower contributions at the time of hire and in strict accordance with the IRS regulations.<sup>30</sup>

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a "nonqualified" retirement plan but that is governed by I.R.C. § 457(f) which requires immediate taxation of non-forfeitable benefits, and is not relevant for PERS.

<sup>28</sup> There is an exception for *new* employees that allows a one time irrevocable choice between high benefits/ high contributions and low benefits/low contributions under stated circumstances.

<sup>29</sup> Rev. Rul. 2006-43.

<sup>30</sup> Treas. Reg. 1.401(k)-1(a)(3)(v).

e. Individual Choice With After Tax Contributions

The tax issue exists because employee contributions are pre-tax. However, employee contributions could be after tax. There do not appear to be any tax issues of the type described above with choice between higher contributions/ higher benefits and lower contributions/lower benefits when the contributions are after tax.

This choice has not been in favor for quite a while but earlier IRS rulings clearly allowed it.<sup>31</sup> It may not be as attractive to employees as pre-tax choices, but employees do not lose the tax value of after tax contributions because when they are paid benefits, the after tax portion is tax free. Furthermore, the net after tax cash in pocket received by employees who opt for lower contributions may offset the somewhat higher taxes owed currently. Additionally, if there is no prearrangement, it might be possible to make contributions after-tax for a limited number of years and then, after bargaining, reinstate pre-tax contributions; this has not been explored with the IRS to our knowledge.

f. Choice Of Different Benefit Structures

Another type of choice is that employees could choose between benefit structures instead of between high/low benefits and corresponding cash in pocket differences, without changing the amount of member contributions. For example, employees could choose between a combination defined contribution/defined benefit package and the current benefit package.<sup>32</sup> It is not likely that the County would save as much money with this type of choice but it could provide more annual contribution cost stability for the County.

**E. DISCUSSION - OPTIONS FOR CHANGE CURRENTLY AVAILABLE UNDER THE PERL**<sup>33</sup>

**1. Summary**

- The vested rights rules set no limits on the County's ability to provide newly hired employees with any options that are currently available under PERS.
- In accordance with the PERL, it should be possible to negotiate increased employee contributions from current employees to pay in whole or in part for "optional" benefits. One important optional benefit for this payment is one year final compensation instead of three year average compensation. Another optional benefit is the current PERS formula for miscellaneous employees that provides benefits greater than 2% at 60 and for safety greater than 2% at 55. John Bartel, the County's actuary, can provide the County with the value of cost shifting of all of its current optional PERS benefits.

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<sup>31</sup> Rev. Rul. 74-385.

<sup>32</sup> Of course, this assumes that a structure is in place that allows such a choice.

<sup>33</sup> All benefit changes are subject to general labor laws so to the extent that the County must otherwise meet and confer on compensation, those same rules apply to changes in retirement benefits.

- It may be possible to implement Article 4 of the PERL which allows individual choice for Riverside County employees between benefit provisions for both current and new employees. John Bartel can provide the County with the amount of cost savings. Also, as discussed above, there are income tax issues with individual choice.

## **2. Reduction of Benefits for All New Hires in a Membership Classification**

Benefits for new hires can be reduced for employees hired after the effective date of the contract amendment with PERS. The new benefit levels must be the same for all employees in a PERS membership classification (e.g., miscellaneous members).<sup>34</sup>

## **3. Shifting the Cost of Optional Benefits to Employees Including Current Employees**

### **a. Shifting Costs of Optional Benefits To Employees**

The cost of optional benefits can be shifted from the County to employees in accordance with an MOU.<sup>35</sup>

Under PERL 20516(a) it appears that the agreement for employees to pay these costs must be made before the optional benefit is elected by the County if the member contributions are to be made under a PERS contract and added to their accounts as "normal contributions". Under PERL 20516(f) the agreement may be made *after* the optional benefit is elected by the County, however it appears that the agreement will not become part of the PERS contract and therefore the member payments will not be accounted for by PERS as member contributions.

There is inconsistency in PERS statements on this issue. Some PERS representatives have publicly stated that this distinction does not exist while others have stated that it does. We suggest that if this cost shifting is of interest to the County that it obtain a written statement from PERS on its position on this issue.

### **b. Examples of Optional Benefits**

One important optional benefit, from a cost perspective, is the definition of final compensation. One year final compensation is stated as an optional benefit both in the County's PERS contract and in the PERS list of optional benefit provisions. The most recent PERS Optional Benefits Listing gives a rough estimate that the reduction in the total employer contribution rate of moving from one year final compensation to three year average compensation could be 0.9% to 1.8% of payroll for miscellaneous groups and 1.8% to 2.9% of payroll for safety groups.

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<sup>34</sup> PERL 20475.

<sup>35</sup> PERL 20516. Note that it appears that PERS takes the position that employees can agree in an MOU that all bargaining unit members must pay higher contributions and also takes the position that employees cannot agree in an MOU that all bargaining unit members will accrue lower benefits for future service. This difference does not make much sense, practically, and therefore gives some credence to an argument that employees should be able to agree in an MOU for lower future accruals of benefits.

Another important optional benefit are retirement formulas in excess of 2% at 60 for miscellaneous employees and 2% at 55 for safety employees<sup>36</sup>.

c. Vested Rights And Cost Shifting

We would not be surprised if a shift of the cost to current employees of one or more optional benefits were challenged under a vested rights theory. However, under the San Diego firefighters case<sup>37</sup> discussed above, it appears that there is a substantial defense to any such claim. The contract -- the PERL, the actual contract between the County and PERS, and PERS's listing of optional benefits -- all support a conclusion that this cost shifting can occur at any time for this benefit. The PERL specifically states that the costs of any optional benefit may be shared by agreement in an MOU. These words are quite similar to the words in the PERL that seem to be the basis for the State increasing member contributions in 2010.<sup>38</sup>

d. Technical Issues For Cost Shifting

There are some technical issues for cost sharing.

First, the PERL is not wholly clear with respect to the unrepresented. Section 20516(a) says that "employees may agree" to pay the cost of optional benefits. Section 20516(f) speaks of an agreement in an MOU. That generally does not exist for the unrepresented. However, a reasonable argument can be made that if any MOU provides for this payment of costs, it should apply to the unrepresented as well.<sup>39</sup>

Second, it is not wholly clear that these contributions are eligible for income tax deferral as tax pickups under the federal tax laws<sup>40</sup>. This is more of an issue if the contributions are made under PERL 20516(f) and they are not part of the PERS contract. We think that if they are made under the PERS contract there is a reasonable argument that they can be made pre-tax and even if not under the contract the better argument is that they are eligible for deferral. However, we have found no IRS guidance on this issue. If the County wants certainty, it can be obtained with an IRS private letter ruling.

Third, if cost shifting occurs under 20516(f) so it is not part of the contract with PERS and if member contributions are after tax, it is not clear how the member would recoup the associated tax basis on receiving benefits from PERS. The reason is that PERS would not have a record of what contributions were after tax so it could not properly report these amounts to the IRS. However, this may not be a practical problem because if there is an agreement for employees to

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<sup>36</sup> CalPERS "Optional Benefits Listing", p. 5.

<sup>37</sup> Int'l Ass'n of Firefighters, Local 145 v. City of San Diego, 34 Cal. 3d 292 (1983).

<sup>38</sup> PERL 20677.4 and current 20677.71.

<sup>39</sup> Most uses of "memorandum of understanding" in the PERL are qualified by reference to the Meyers-Milias-Brown Act or to the "exclusive bargaining agent" or to the "recognized employee organization." Those limits do not appear in PERL 20516. That also suggests that the agreement can be between individual unrepresented employees as a condition of employment.

<sup>40</sup> However the IRS will likely take the position that these contributions are subject to Social Security and Medicare tax. See CCA 200714018 (4/6/07).

pay for some or all of the cost of optional benefits it is most likely that this would not be on an optional basis but would apply to the entire group affected such as a collective bargaining unit.

e. An Agreement Is Required for Cost Shifting

Both section 20516(a) and 20516(f) require an "agreement" or "agreeing in a memorandum of understanding" to implement cost shifting. Therefore it does not appear that the County could impose cost shifting in the absence of an agreement.

f. Can Employees Pay Part of The County's Contributions For More Than Optional Benefits?

Some agencies have explored whether they can enter into MOUs under which employees pay part of the agency's retirement contributions in addition to the cost sharing allowed for optional benefits.

Generally, the PERL requires that the agency "shall make the contribution for its employees" as determined by PERS.<sup>41</sup> This suggests that it may be difficult for employees to pay part of the employer's contributions. However, section 20516(f) states that the agency and employees may agree in an MOU to share the cost of "any benefit" "when initially entering into a contract." (In context, "contract" seems to mean a contract with PERS but might mean an MOU.) This section clearly says that employees can agree to share all or part of the cost of any benefit, which includes all or part of the employer's cost of any benefit formula. The question then is how the phrase "initially entering into a contract" is to be read. As discussed above, PERS seems to have provided inconsistent answers on a similar issue under 20516(a) and this uncertainty may also carry over to 20516(f). We suggest that if this cost shifting is of interest to the County that it obtain a written statement from PERS on its position on this issue<sup>42</sup>.

#### 4. Individual Choice Between Benefit Formulas

As discussed above, it appears that, though an MOU, the County could offer individual choice between benefit formulas in PERL Sections 20550 et seq. However these issues must be resolved first:

- Will this particular choice yield cost savings?
- Will PERS contract with the County under these sections or will PERS take the position that they are "old and cold" and can no longer be used.

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<sup>41</sup> PERL 20532. Additionally, PERL 20516(f) allows agreement by MOU for employee payment of "any benefit" "when initially entering into a contract". This section suggests that employees can agree to pay part or all of the employer's contributions but only on "initially" entering into a contract with PERS. Perhaps PERS might read "initially" as applying to the initial inclusion of, e.g., a retirement formula in a PERS contract, but that is not clear.

<sup>42</sup> Of course by MOU compensation can be adjusted by reduction or lack of increase so in economic effect employees are paying part of the County's contribution; however the reduction or lack of increase would not be compensation for PERS benefits.

- How will the County deal with the income tax issues described above?<sup>43</sup>

## **F. DISCUSSION -- OPTIONS FOR WITHDRAWAL FROM PERS**

The reason for withdrawal from PERS would be because the County would like to provide a retirement program that is not available under PERS now or through new legislation. The County is considering some options that are not available under PERS currently.

### **1. Summary**

- The County can withdraw from PERS by following the PERL's termination and withdrawal procedure. The procedure has required formalities and we suspect that PERS would be very conservative in setting the cost of withdrawal. That can only be determined by talking with PERS.
- The PERL includes a procedure for a spin-off of all County-related benefits and liabilities to a county retirement system. Therefore, the County could establish its own system under the 37 Act or perhaps under other enabling sections of the Government Code. The County may be able to minimize the resulting work by outsourcing administration and investment functions as often is done in the private sector.
- The PERL includes targeted provisions for particular agencies for the spin off to other retirement programs of PERS benefits and liabilities. The County may be able to leverage such provisions into its own legislation if existing spin-off rules are not acceptable.
- There are two potential options for excluding new employees only from PERS. One option requires PERS approval and it is not likely that PERS would approve. A second option does not require PERS approval. Under that section, new employees could be excluded and also current employees could be excluded based on individual elections. It is likely that PERS would challenge this action. A spin-off should be easier.

### **2. Termination and Withdrawal from PERS**

If the County's contract with PERS was established by resolution or ordinance, the County may withdraw from PERS by a two-thirds vote of the members of the Board of Supervisors (a vote of

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<sup>43</sup> Note that if employee contributions become after tax in order to resolve the income tax issues, PERS should not have any problem recording contributions as after tax and reporting them properly when benefits are paid. PERS recorded and reported employee contributions in this way for decades and might still receive after tax contributions from some local agencies.



4 of the 5 supervisors). If the contract with PERS was established by the voters then withdrawal requires a majority vote of the electorate.<sup>44</sup>

With a vote to withdraw, the County will have to negotiate with PERS for the terms and conditions of payment of its remaining unfunded liability including the possible later increase in liability because of reciprocity affecting final average compensation of future retirees.<sup>45</sup> We understand that previously PERS has taken a very conservative position with respect to determining such liability. We have no current experience with PERS's current position. If the County is interested in withdrawal we recommend that it obtain from PERS its preliminary calculations for liability. We also recommend that the County's actuary scrutinize both the data and the assumptions that PERS uses for these calculations, that any data and assumptions be fully consistent with the same that PERS uses for regular contribution requirements for a closed group, and that the earnings rate used for the calculation be the same long-term rate that PERS uses for its funding. Even in these circumstances, though, the County's contributions to PERS may increase on withdrawal because no new County employees would be added to PERS.

### **3. Spin-off to a County Retirement System**

The County can be completely free of obligations to PERS, and PERS can be completely free of obligations to County employees, under the spin-off provisions of the PERL.<sup>46</sup> These are not mandatory provisions, for the PERL says that PERS "may enter into an agreement" with the agency and the board of supervisors of a county maintaining a county retirement system.<sup>47</sup> With such an agreement, all assets "representing the value" of the interests of the agency and its employees are transferred to the county system and "all liability of [PERS] with respect to members and retired persons under the contract shall cease and shall become the liability of the county retirement system."<sup>48</sup>

We are not aware that PERS has engaged in such a spin-off in recent memory. Therefore, if the County is interested in this action we suggest that it meet with PERS to determine the terms and conditions that PERS may request in any agreement. (The agreement must contain provisions that PERS "finds necessary to protect the interests" of PERS.)<sup>49</sup> Because PERS will no longer be responsible for the benefits spun off to another system, the cost to the County of this alternative should be lower than a straight termination. We suspect, however, that there will be substantial discussion with PERS on the terms of a spin-off.<sup>50</sup>

There is a practical matter of what county retirement system the County might wish to consider and whether such a system might be more attractive than PERS. There are a number of possibilities. (i) Riverside County may establish its own county retirement system under the

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<sup>44</sup> PERL 20570, 20571.

<sup>45</sup> PERL 20573 - 20575.

<sup>46</sup> PERL 20585.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> For example, the valuation of assets allocated to the County may be up for discussion, and PERS may also want to be sure that any vested rights of members are preserved.

County Employees Retirement Law ("CERL" or "37 Act").<sup>51</sup> (ii) Creating its own system may involve more work than the County wants. Therefore, it may wish instead to consider joining an existing county retirement system that would like to add the County as a contributing employer. This probably would require a change to the CERL.) The reason for doing this would be to obtain economies of scale for the existing system and for Riverside County. (iii) It may be possible for Riverside County to establish its own system under the CERL and then, for economies of scale, outsource to another CERL system or to a private sector vendor both recordkeeping and/or investment.<sup>52</sup> (iv) At least one county -- San Luis Obispo -- has established its retirement system under other sections of the Government Code.<sup>53</sup> This allows a more focused type of retirement system and Riverside County may find that it allows for more flexibility. (The PERL suggests that a system under the CERL is contemplated in a spin-off but this is not a clear mandate.)<sup>54</sup>

It is possible that a claim could be made that there are vested rights to stay in PERS. However, building on the San Diego firefighters case, it appears that the contract -- the PERL -- has included a provision for spin-off to a county retirement system since 1970. As discussed above, the fact that the PERL allows spin-offs, and that these appear to have been enacted after benefits were earned under PERS, is strong evidence that vested rights should not be an issue. Nevertheless, as noted, this issue has not been decided by the courts as far as we can determine.

## **5. Excluding Employees from PERS**

There are two provisions in the PERL that could allow exclusion of some County employees from PERS and leave others with PERS retirement benefits. We suspect that PERS would challenge exclusion of County employees under both of these provisions. Therefore, other options might be more productive.

First Exclusion -- New Hires Only -- Newly hired non-safety employees may be excluded from PERS membership based on "groups of employees such as departments or duties and not on individual employees".<sup>55</sup> A literal reading of this section would allow all new employees in all departments and duties to be excluded from PERS. We suspect that PERS would not approve that exclusion, and the PERL gives authority to PERS to disapprove of exclusions if in PERS judgment exclusion would adversely affect the system.<sup>56</sup> PERS could be concerned that exclusion of all new employees would start a run for the door away from PERS.<sup>57</sup>

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<sup>51</sup> CAL GOV'T CODE § 31450, *et seq.*

<sup>52</sup> A number of preliminary issues would, of course, have to be worked out including cost sharing, governance, the ability to withdraw, etc.

<sup>53</sup> CAL GOV'T CODE § 53215, *et seq.*

<sup>54</sup> Please note that the PERL includes a number of sections that provide for specific spin-offs from PERS. If there are particular issues for Riverside County and a spin-off, there is precedent in the PERL for special legislation to accommodate its needs. PERL 20586 - 20590.

<sup>55</sup> PERL 20502.

<sup>56</sup> *Id.*

<sup>57</sup> The way for PERS to avoid a run would be to make its system more competitive and attractive to both employers and employees.

We are not aware of prior PERS actions concerning such exclusions. Therefore, if the County is interested in taking this action, it should obtain from PERS any prior history and, most importantly, any criteria that PERS has used to evaluate whether the exclusion of groups will be disapproved. Of course, if there is such exclusion the County will want to consider other retirement benefits and another retirement system for the excluded.

Second Exclusion - New Hires and Current Employees -- The PERL *requires* exclusion from PERS of any individual who is covered for current service by another public sector retirement system.<sup>58</sup> For this purpose, retirement system is defined broadly because the exclusions specifically allow concurrent coverage under retirement plans that some might not think of as retirement "systems", including deferred compensation and money purchase pension plans. There is no exception to this mandated exclusion. In fact, the PERL makes clear that there is no exception when it states that the mandatory *inclusion* of all employees in a membership classification "*shall not be construed to supersede*" the mandatory exclusion of section 20303.<sup>59</sup> Therefore, it appears that the mandatory exclusion is without limit if it applies.

For new employees, it appears that exclusion from PERS must occur if they are automatically covered by another County-provided retirement system that is not an exception to the mandatory exclusion rules. (See below for what would qualify.)

For current employees, because of vested rights rules, it appears that this path to exclusion from PERS is best done on a voluntary, individual elective basis. (See above for tax issues with elections.) Current employees could be given the choice between the existing PERS benefit and a lower benefit/lower employee contribution defined benefit plan. The choice even could be broader, as discussed below, such as between the current PERS benefit and a cash balance plan. If the non-PERS plans come within the mandatory you-must-be-excluded-from-PERS rules, this would seem to automatically take these individuals out of PERS.

Participants in plans who must be excluded from PERS include participants in certain defined contribution plans<sup>60</sup> and certain defined benefit plans.<sup>61</sup> While this path might seem straightforward based on the words of the PERL, we caution that it could be challenged by PERS, perhaps both in the courts and the Legislature. A different course may be to try to obtain changes to the PERL that modernize benefits for County employees.

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<sup>58</sup> PERL 20303, 20894.

<sup>59</sup> PERL 20502.

<sup>60</sup> Specifically excluded are money purchase pension plans that do not have an IRS ruling on tax qualification. PERL 20303(b)(3).

<sup>61</sup> Specifically excluded are defined benefit plans providing current service coverage if PERS is not designated as the County's "primary plan" for the individual, or if the individual's participation in the plan "interferes with his/her rights under PERS, or if the plan does not have an IRS ruling on tax qualification. Any one of these conditions creates the required exclusion from PERS. PERL 20303(b)(4).

## **G. DISCUSSION -- OPTIONS NOT CURRENTLY WITHIN PERS**

The prime reason to withdraw from PERS is that there are opportunities for new types of benefit structures outside of PERS.<sup>62</sup>

Below are comments on options that the County is considering. Each of these might be achieved by amendments to the PERL that are specific to Riverside County.

### **1. Summary**

- As noted, there is no legal limit on the retirement benefits provided to new employees other than what may be required under collective bargaining.
- The options being considered by the County for benefits not in PERS include: cash balance plans, defined contribution plans, a combination of defined benefit and defined contribution plans, and defined benefit plans with no COLA or post-retirement survivor benefits. For current employees, unless the County wishes to engage in substantial litigation with an uncertain outcome, the only way to implement these options is to give each employee individual choice of benefits. As noted, the tax rules currently present a hurdle for this choice though there are ways to deal with this issue. As a practical matter, the issue is why any employee would choose a new option; the answer is always a personal one, and the County can help influence this answer with incentives.

### **2. Two-Year Holdout - New Employees**

New State employees do not earn PERS service credit for two years; instead they contribute 5% of their salary to the State's defined contribution plans. Thereafter they earn PERS credit and after four years may use their defined contribution account balance to purchase service credit for the first two years. It seems reasonable that this same rule apply to local agencies. The County may also prefer that after two years employees must opt into PERS benefits or automatically stay with the defined contribution plan. Amendments to the PERL are required.

### **3. Safety Members**

The options being considered by the County are variations on current safety member formulas, some with substantial reductions or a cash balance plan. If the County is able to obtain changes to the PERL focused on Riverside County, as in 1986, then it may be easier to stay in PERS. However, if PERS does not want to administer such formulas, or if it is not possible to get changes in the PERL, then a spin-off to a Riverside County plan may be best as discussed above.

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<sup>62</sup> Please note that if the County moves to a CERL system currently there may not be more flexibility of benefit structures than are available under PERS. Instead, to obtain flexibility the County would want either to obtain amendments to the CERL that are focused on Riverside County or it would want to follow the lead of San Luis Obispo and establish its own stand-alone system.

As noted above, if the County's goal is to encourage current employees to move to a new formula, then individual choice between the old and new formula is an important way to avoid vested rights issues. An incentive to opt for the new formula would be lower employee contributions.

#### **4. Miscellaneous Members**

The options of interest to the County for miscellaneous members include possible structural changes: no COLA for a defined benefit plan; a cash balance plan for new employees with an incentive for current employees to opt in; a defined contribution plan only for new employees; a combination defined benefit and defined contribution program.

PERS's Role -- Technically, the PERL could be amended to provide for any of these options. PERS should be able to administer a cash balance plan because it currently keeps records for member contribution accounts that are very similar to records needed for cash balance plans.<sup>63</sup> PERS also should be able to maintain defined contribution accounts or outsource recordkeeping to qualified vendors. PERS currently is a 457 plan provider so it can clearly manage a defined contribution plan. PERS should be able to administer benefits with no COLA because eliminating the COLA is a matter of changing calculation and actuarial software.

Even though PERS technically should be able to administer these plans, nevertheless they may not fit within PERS culture so PERS may be reluctant to be the administrator. In that case, though, it would be inappropriate for PERS to be an obstacle to the County's goals.

New Employees -- For the County to provide such new structures to new employees, the County needs to find out PERS's position with respect to new legislation. Will PERS support such structures within PERS by supporting legislation for Riverside County? What are PERS's concerns and what is needed for PERS to support and implement the County's goals for new retirement structures? Will PERS facilitate the County's goals or will PERS be an obstacle? These and other questions must be answered before the County decides what path to take, if it wishes to implement benefits that are not currently provided by PERS.

Current Employees -- As discussed, the path of least legal problems regarding vested rights rules for current employees is to give them individual choice of benefit structures. Assuming that the tax issues are resolved (see the discussion above), then the County needs to find out

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<sup>63</sup> A cash balance plan provides an account for each member to which hypothetical contributions are allocated and on which a stated level of earnings is also credited. The difference between this and a defined contribution plan is that under a cash balance plan at least some investment risk, and all mortality risk, is undertaken by the employer. However, recent proposed IRS regulations allow the earnings credit to a cash balance account to be based on the actual rate of return of the plan, subject to some restrictions such as requiring diversification in investments. Therefore, the employer's risk of earnings credits can be substantially reduced under these regulations. With a cash balance plan there can be more of a balance of risks, with the employer having less risk of volatility in contributions and less risk in earnings rates, and the employee having less risk of mortality. In this respect, a cash balance plan can provide more balanced risk than a defined contribution plan. Different designs have different risk characteristics.

PERS's position with respect to new legislation. The same questions set out above must be asked, ultimately to determine if PERS will assist the County or be an obstacle..

The practical question is why would current employees choose a cash balance plan, a defined contribution plan, or a combination of defined benefit/defined contribution plan instead of what they now have. Each choice will be personal. Some generalizations can be offered, however.

- Over the long run, sometimes a defined contribution (or cash balance) plan provides more retirement income to employees than does a defined benefit plan. This is particularly the case for younger employees. Depending on the assumptions made, the "break even" point is often between ages 35 and 40<sup>64</sup>. So younger employees may be more inclined to choose defined contribution or cash balance plans.
- Defined contribution (and cash balance) plans provide more "portability" than the existing defined benefit plans for employees who do not envision a long-term career in the public sector. This type of employee may, or may not, fit the County's needs. More mobile employees may be more inclined to choose defined contribution or cash balance plans.
- If employees are given the choice between a defined benefit (or other) plan that requires a high cash employee contribution and provides a high benefit or a plan that requires a lower cash contribution and provides a lower benefit, some employees will opt for the lower contribution plan. This can occur for many reasons, but current cash needs of course is a main factor.
- The County can offer an incentive to choose a cash balance plan by providing a large initial account balance paid on an amortized based over a number of future years, especially to older employees who may otherwise find that a cash balance plan does not provide enough value.<sup>65</sup> Also, the County can design the plan so employees become "vested" in that balance as they stay longer with the County. An alternative design would be to provide higher account credits to older/longer service employees under a cash balance plan.<sup>66</sup> The goal of this type of design would be to eliminate the potential downsides of a cash balance plan for current employees. Of course, the cost of incentives must be balanced against the County's goals. Cost savings may be one goal; achieving stability in contributions and establishing a retirement program that best fits the County's workforce may be another.

## **H. CONCLUSION**

There are clear opportunities for the County to be a leader in pension reform and clear opportunities for PERS and for County employees to join with the County in leadership. In some cases there are legal hurdles for change in the County's pension program, some established by California law and some established by federal tax law. There are ways to work

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<sup>64</sup> We always advise clients not to rely on your lawyers for numbers; instead please rely on your actuary.

<sup>65</sup> Because of the tax laws, providing a large initial balance is more difficult under defined contribution plans.

<sup>66</sup> The initial balance and/or the additional credits could be different based on age and service.

Ms. Barbara Olivier  
Mr. Shawn Atin  
County of Riverside  
March 25, 2011  
Page 24

with these hurdles, however, so they should not be "deal breakers". The County should determine its goals for pension reform, determine the practical options, and then move forward to implement its goals.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Robert Blum". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Robert A. Blum

RAB/sf



## County of Riverside

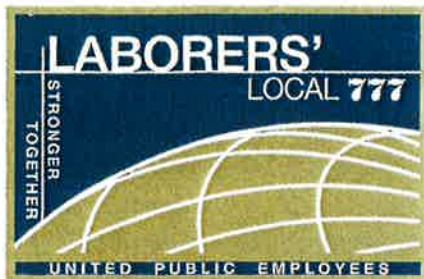
**B**ARTEL  
ASSOCIATES, LLC

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### Pension Reform

March 23, 2011





VISIT US ON THE WEB: [www.ifu777.org](http://www.ifu777.org)

**MAX WARREN CENTER**

4000 TENTH STREET  
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LOS ANGELES, CA 90010  
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74-040 HIGHWAY 111, SUITE L #203  
PALM DESERT, CA 92260  
PHONE: (760) 836-0073  
PHONE (760) 836-9287

**April 4, 2011**

**VIA FACSIMILE AND PERSONAL DELIVERY**

Honorable Bob Buster, Chairman  
Honorable John Tavaglione, Vice-Chair  
Honorable Jeff Stone, Third District  
Honorable John Benoit, Fourth District  
Honorable Marion Ashley, Fifth District  
4080 Lemon St.  
Riverside, California

Chairman Buster and Members of the Board:

Laborers' International Union of North America Local 777 (Local 777) is dismayed at the notion that the County of Riverside (County) is contemplating unilateral action to amend retirement benefits for "New Employees."

Let us be perfectly clear: retirement benefits are a mandatory subject of bargaining. This is well-established under federal and California law. An employer cannot unilaterally change these benefits, nor evade the meet and confer process. It is the position of Local 777 that the County must bargain over changes in the retirement plan as a matter of law and should do so as matter of sound public policy.

The County's jump directly to unilateral action to implement changes does not eliminate the duty to bargain; it instead violates that duty. The Meyers-Milias-Brown Act sets forth the County's obligation to provide notice and an opportunity to bargain when a County is considering action affecting a matter within the scope representation. [*Government Code Section 3504.5 (a)*].

Changes of this kind have long been recognized as a mandatory subject of bargaining. This is because pension benefits are "an integral part of the entire wage structure." *Inland Steel Co.*, 77 NLRB 1, enforced, 170 F.2d 247 (7<sup>th</sup> Cir. 1948), cert. denied, 336 U.S. 960 (1949). In this regard, a unilateral change to pension benefits is no different than a unilateral change to wages—and no more lawful. See, *id.* The affirmative duty to negotiate has also been recognized by

Submitted by Victor Gordo  
4/4/11 Item 1.0-2.0  
(date)

the Public Employment Relations Board (PERB) with respect to public agencies in California. [*CSEA v. Clovis Unified* (2002) PERB Dec. No. 1504; *Sacramento County Attorneys Association v. County of Sacramento* (2008) PERB Dec. No. 1943-M].

Moreover, the County and Local 777 (“the parties”) have negotiated over this mandatory subject of bargaining in the past resulting in the codification and confirmation of the retirement benefits for Local 777 members in the MOU. In pertinent part the MOU Article VI, Section 1 Retirement reads:

**“Retirement Calculations**

The percentage of final compensation to be provided for each year of credited prior and current service for Miscellaneous members of LIUNA shall be determined in accordance with Section 21354 of the Public Employees Retirement Law subject to the reduction provided therein for Federal Social Security (2% at age 55 Modified and Full). **Effective July 11, 2002, the percentage of final compensation to be provided for each year of credited prior and current service for Miscellaneous members of LIUNA shall be determined in accordance with Section 21354.3 of the Public Employees Retirement Law subject to the reduction provided therein for Federal Social Security (3% at age 60 Full and Modified formula).** (emphasis added).”

This modification affecting the retirement benefits of all Local 777 bargaining unit members (present and future) cannot now be modified by unilateral action of the County.

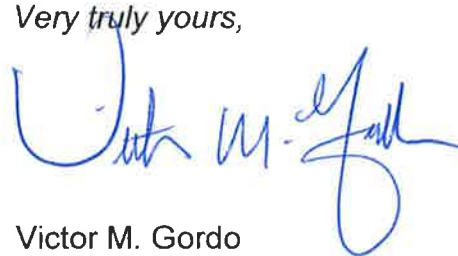
Put simply, the contract language, past practice, and the County’s statutory duty to meet and confer leave no room for any argument that the County may modify retirement benefits unilaterally. Attempting to avoid the duty to meet and confer by simply applying the changes to “future employees” is nonsensical. The terms you seek to change are terms of employment. Further, the distinction seemingly being made between “existing employees” and “new employees” does not exist in the law, and for good reason: both groups are among our represented employees.

The evasion of the County’s duties is compounded by the lack of opportunity to review and respond to the County’s proposal. The failure to provide notice prior to March 30, 2011 can only be interpreted as bad faith towards Local 777 and its membership.

Absent complete and accurate information about the County’s proposed actions and an earnest good faith effort to meet and confer, Local 777 is handicapped in its role as the sole bargaining representative of its members.

We therefore urge you to reject the approval in concept of any unilateral action related to pension reform. Instead, Local 777 urges that you abide by your contractual and statutory duty to meet and confer regarding any changes to employee terms of employment. Failure to do so will result in LIUNA Local 777 protecting the rights of its membership by initiating challenges to the misguided and legally defective process and action(s) now before you.

*Very truly yours,*

A handwritten signature in blue ink, appearing to read "Victor M. Gordo". The signature is fluid and cursive, with a large initial "V" and a long, sweeping tail.

Victor M. Gordo  
General Counsel

Cc:

Stephen Switzer, Business Manager  
LIUNA Local 777, Executive Board  
Riverside County, County Counsel

Riverside County Board of Supervisors  
Request to Speak

Submit request to Clerk of Board (right of podium),  
Speakers are entitled to three (3) minutes, subject  
Board Rules listed on the reverse side of this form.

SPEAKER'S NAME: Steve Matthews

Address: 4336 Market st.  
(only if follow-up mail response requested)

City: Riv. Zip: 92501

Phone #: 9516869372

Date: 4-4-11 Agenda # 1.00-2.00

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:  
X Support X Oppose Neutral

Note: If you are here for an agenda item that is filed  
for "Appeal", please state separately your position on  
the appeal below:

Support Oppose Neutral

I give my 3 minutes to: \_\_\_\_\_

Riverside County Board of Supervisors  
Request to Speak

Submit request to Clerk of Board (right of podium),  
Speakers are entitled to three (3) minutes, subject  
Board Rules listed on the reverse side of this form.

SPEAKER'S NAME: Bob Schoonover

Address: 6336 Market St Riv.  
(only if follow-up mail response requested)

City: Riv Zip: 92501

Phone #: 9516869372

Date: 4-4-11 Agenda # 1.00-2.00

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:  
Support X Oppose Neutral

Note: If you are here for an agenda item that is filed  
for "Appeal", please state separately your position on  
the appeal below:

Support Oppose Neutral

I give my 3 minutes to: \_\_\_\_\_

Riverside County Board of Supervisors  
Request to Speak

Submit request to Clerk of Board (right of podium),  
Speakers are entitled to three (3) minutes, subject  
Board Rules listed on the reverse side of this form.

SPEAKER'S NAME: Dennis White

Address: 871 ALDER  
(only if follow-up mail response requested)

City: CORONA Zip: 92879

Phone #: 951-371-4876

Date: 4-4-11 Agenda # 1.0-2.0

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:  
Support  Oppose  Neutral

Note: If you are here for an agenda item that is filed  
for "Appeal", please state separately your position on  
the appeal below:

Support  Oppose  Neutral

I give my 3 minutes to: \_\_\_\_\_

Riverside County Board of Supervisors  
Request to Speak

Submit request to Clerk of Board (right of podium),  
Speakers are entitled to three (3) minutes, subject  
Board Rules listed on the reverse side of this form.

SPEAKER'S NAME: Victor M. Gordo

Address: \_\_\_\_\_  
(only if follow-up mail response requested)

City: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone #: (213) 380-6678

Date: 4-4-11 Agenda # 1.0 and 2.0

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:  
Support   Oppose  Neutral

Note: If you are here for an agenda item that is filed  
for "Appeal", please state separately your position on  
the appeal below:

Support  Oppose  Neutral

I give my 3 minutes to: \_\_\_\_\_

Riverside County Board of Supervisors  
Request to Speak

Submit request to Clerk of Board (right of podium),  
Speakers are entitled to three (3) minutes, subject  
Board Rules listed on the reverse side of this form.

SPEAKER'S NAME: Jake White

Address: 4336 Market st  
(only if follow-up mail response requested)

City: RIV. Zip: 92501

Phone #: (951) 686-7372

Date: 4-4-11 Agenda # 1.0-2.0

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:  
Support  Oppose  Neutral

Note: If you are here for an agenda item that is filed  
for "Appeal", please state separately your position on  
the appeal below:

Support  Oppose  Neutral

I give my 3 minutes to: \_\_\_\_\_

*Did NOT respond*  
Riverside County Board of Supervisors  
Request to Speak

Submit request to Clerk of Board (right of podium),  
Speakers are entitled to three (3) minutes, subject  
Board Rules listed on the reverse side of this form.

SPEAKER'S NAME: Mary Venerable

Address: 23535 State Hwy 74  
(only if follow-up mail response requested)

City: Perris Zip: ca

Phone #: 951-443-4551

Date: 4/4/11 Agenda # 1.0-2.0

PLEASE STATE YOUR POSITION BELOW:

Position on "Regular" (non-appealed) Agenda Item:  
Support  Oppose  Neutral

Note: If you are here for an agenda item that is filed  
for "Appeal", please state separately your position on  
the appeal below:

Support  Oppose  Neutral

I give my 3 minutes to: \_\_\_\_\_