

REC'D MAR 04 2011



# Central Contra Costa Sanitary District

Protecting public health and the environment

5019 Imhoff Place, Martinez, CA 94553-4392

MEETING DATE

APR 13 2011

AGENDA ITEM

#16

March 4, 2011

Mr. Jerry Telles  
Chairperson of the Board  
Contra Costa County Employees'  
Retirement Association  
1355 Willow Way, Suite 221  
Concord, CA 94520

## RE: CCCERA'S ACTIONS ON DE-POOLING

Dear Mr. Telles:

We received Marilyn Leedom's letter of January 25, 2011. We thank you for that response, however the Central Contra Costa Sanitary District ("District") is not satisfied that it fully addressed the issues raised in our letter of December 27, 2010 or the current circumstances facing public agencies.

Initially, we recognize that both the County Employees Retirement Law ("CERL") and the California Constitution, as amended by Proposition 162 in 1992, do provide substantial authority to the CCCERA Board for the administration of the retirement system. We accept that CCCERA has the "sole and exclusive power to provide for actuarial services in order to assure competency of the assets of the public pension or retirement system", as well as other enumerated responsibilities (California Constitution Article XVI, section 17). However, we do not believe pension boards are exempt from the scope of judicial review, nor from the careful scrutiny by impacted member agencies and the constituents that ultimately pay the bills. We do not accept the implication that CCCERA's authority is essentially unrestricted or not subject to traditional legal limitations. Separately, we question CCCERA's authority to act in a manner based on a "retroactive" approach<sup>1</sup> when responsible member agencies made financial decisions relying on your prior policies and contribution rates. If this were

<sup>1</sup> Ms. Leedom's letter of January 25, 2011 attempts to suggest that the effect of the de-pooling decision of the Board of Retirement was not retroactive because it only impacts future contribution rates. However, common sense and your actuary recognize your actions in fact adopted a "retroactive" approach. (Segal Company Letter dated August 31, 2010 at pg. 5).

the case, future CCCERA decisions could create or eliminate additional financial obligations on publically funded agencies without restriction, even when these decisions might offend the basic legal principles such as those related to retroactivity and detrimental reliance. We question if CCCERA's records had been relatively complete for the past 50 years, would CCCERA have no limitation on taking a retroactive approach dating back 50 years?

Notwithstanding the District's substantial concern with CCCERA's contention that it has unchecked authority on retirement policy decisions, including the right to take actions through a retroactive approach, we want to clarify that the District does not seek to take legal action to reverse CCCERA's de-pooling decisions. Our reluctance to consider litigation is based on the simple proposition that the District does not seek for any other member agency to subsidize any of the costs of retirement of its employees. Therefore, the District will pay appropriate amounts to cover all of its costs resulting from de-pooling and the delay of CCCERA to change its "Policy" in response to the clarification on final compensation resulting from the *In re Retirement cases* (2003) 110 Cal.App.4<sup>th</sup> 426. The District, does, however, seek procedural changes to prevent similar unfortunate circumstances from occurring in the future.

The District strongly suggests one of several courses of actions should be pursued. The intent is to provide for meaningful input from member agencies and minimize the potential for future decisions that result in unfortunate instances of detrimental reliance or missed opportunities to react to favorable changes in the law. The District strongly requests that CCCERA promptly adopt new formal bylaws or regulations that mandate a formal notice and right to comment by member agencies on important policy changes substantially affecting their finances. These regulations should provide for written responses from CCCERA to member agency comments and a realistic avenue for lodging formal objections, including an administrative appeal procedure.

Separately, the District requests a joint meeting of a Board Committee of CCCERA with a District Board Committee to initiate consideration of these formal bylaw or regulation changes and address the appropriate roles of CCCERA vis a vis its member agencies. The subject of discussion should be to address the nature of reforms that may eliminate similar controversies in the future and enhance responsiveness to the financial realities of member agencies and the public.

The current financial difficulties of governmental entities throughout California and the nation highlight the need for new approaches, greater transparency and closer attention to the impact of the increasing cost of public services. Taking no action at this time does not appear to be an acceptable alternative.

Jerry Telles, Chairperson of the Board

March 4, 2011

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In closing, our December 27, 2010 letter appears to have been handled in a manner intended to deflect public attention or Board-level consideration of our concerns. It is the intent of this letter that these issues receive thoughtful public consideration and to that end we are reattaching our letter of December 27, 2010 and providing copies of both to each CCCERA member agency.

Sincerely,



Barbara D. Hockett  
Board President

Attachment

cc (with attachment):

CCCERA Board of Directors  
✓ Marilyn Leedom, CCCERA Executive Director  
All CCCERA Member Agencies  
Daniel Borenstein, Contra Costa Times  
CCCSD Board of Directors



# Central Contra Costa Sanitary District

Protecting public health and the environment

5019 Imhoff Place, Martinez, CA 94553-4392

December 27, 2010

## HAND DELIVERED

Honorable Members of the Board  
Contra Costa County Employees' Retirement  
Association  
1355 Willow Way, Suite 221  
Concord, CA 94520

### BOARD OF DIRECTORS:

MICHAEL R. MCGILL  
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Dear Members of the Board:

The Central Contra Costa Sanitary District ("CCCSD") Board of Directors thanks CCCERA for the information it has provided and for delaying action on its consideration of retroactive de-pooling to allow CCCSD to review CCCERA's proposed rate adjustments. CCCSD has spent substantial effort in evaluating the retroactive de-pooling decision of CCCERA and the implementation of those decisions through the proposed member rates, to be implemented July 1, 2011.

The cumulative impact of CCCERA's actions or inactions and the de-pooling methodology would increase CCCSD's unfunded liability (and hence burden our ratepayers) by \$20 million. This potential unfunded liability would result in a substantial increase in CCCSD's cost of operations beginning in July 2011. As part of our review to ensure CCCERA was correctly calculating our liability, CCCSD reviewed our practices of reporting final annual salary (FAS) to CCCERA (following CCCERA Policy "Determine Which Pay Items are "Compensation" for Retirement Purposes" ("Policy")). Based on this review we concur with CCCERA's analysis that the vast majority of the pay codes that make up the FAS are being correctly reported (memorandum from Harvey Leiderman to Marilyn Leedom dated September 16, 2010), and hence the retirement benefits comply with CCCERA's "Policy".

The CCCSD Board has significant concerns about decisions CCCERA made that led to the proposed de-pooling action, although we are willing to consider paying our fair share of the de-pooled retirement costs, as appropriately determined. CCCSD rejects the proposition that all of the current circumstances which have led to de-pooling could not have been avoided or ameliorated. We contend it is the CCCERA Board, not the employer, that has the constitutional and statutory duty to manage retirement funds and to determine whether and how much the fund is obligated to pay to individual retirees.

Central Contra Costa Sanitary District further contends that subsequent to the July 11, 2003 decision of *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 457-460, CCCERA had both the opportunity to and obligation to modify its "Policy" as it ultimately did on March 10, 2010. It is worth noting that CCCERA's lack of action after 2003 led to much of CCCSD's and other employers' accrued de-pooling unfunded liability. We "contract" with you to administer the fund and your failure to either track or consider changes in the law at that time detrimentally impacted CCCSD and other employers. For example, approximately 90 of CCCSD's 250 employees have been hired since January 2004, and could have been covered by the second tier policy adopted

this year. We would like to know why the decision to set up a second tier was delayed for years and only occurred when "spiking" became a matter of public controversy.

Given the significant public policy change by CCCERA to move from a pooled system to a de-pooled system by employer and to do so retroactively, and the resultant unanticipated liability and costs to CCCSD and several other employers, we, as Board members of CCCSD, request that:


- (1) the CCCERA Board respond to our questions set forth on Attachment A as an agenda item for the CCCERA January 12, 2011 Board meeting, and
- (2) the CCCERA Board make this letter available for distribution at the meeting as part of the public record.

The purpose of our letter is to seek a statement and understanding from the CCCERA Board as to its perceived authority for certain decisions and the process used to make those decisions so we can perform our due diligence as a Board and to ensure this is a lawful change in public policy. We hope that your response to this request will satisfy our concerns and make CCCERA's decision-making process more transparent to CCCSD as an employer member, to other employer members, as well as to the public. It is critical that future decisions which affect CCCSD's financial and policy status allow for our timely input prior to becoming final.

Notwithstanding these comments and the questions set forth in the attachment, the professional manner in which you and your staff have dealt with our inquiries and concerns on this matter is appreciated.

We look forward to CCCERA's response to this letter and the questions presented in the attachment. If the Board has any questions or needs further clarification, please contact James M. Kelly, General Manager, at (925) 229-7386.

Sincerely,



Michael R. McGill, P.E.  
President of the Board of Directors  
Central Contra Costa Sanitary District

cc: Ms. Marilyn Leedom, Executive Director

Attachment A: Questions to CCCERA Board of Directors regarding de-pooling

## **ATTACHMENT A**

### **I. October 13, 2009 "De-pooling" Decision**

1. Please identify the authority CCCERA relied upon to unilaterally implement its October 14, 2009 "de-pooling" decision. To prevent any confusion, our question seeks the following:
  - a. Did CCCERA rely on any California constitutional authority? If so, please specify.
  - b. Did CCCERA rely on any California statutory authority? If so, please specify.
  - c. Did CCCERA rely on its own regulations, bylaws or other authority? If so, please specify.
  - d. Is there any authority CCCERA relied upon other than the above?
  - e. Does CCCERA believe that its Board has unfettered authority to make policy decisions, without seeking input and/or approval from its employer members? If so, what authority does the Board rely upon for this conclusion?
2. Is it CCCERA's position that its "de-pooling" decision did not require consent or other form of approval from its employer members? If so, what is the authority for that conclusion?
3. When did the CCCERA Board commence its discussion of adopting a "de-pooling" policy? Please provide a list of dates when this issue was discussed by the Board, including publicly noticed open and closed session meetings.

### **II. Retroactive Effect of "De-pooling" Decision**

1. Please identify the authority CCCERA relied upon to unilaterally decide to effectuate the "de-pooling" decision retroactively to 2002.
  - a. Did CCCERA rely on any California constitutional authority? If so, please specify.
  - b. Did CCCERA rely on any California statutory authority? If so, please specify.
  - c. Did CCCERA rely on its own regulations, bylaws or other authority? If so, please specify.
  - d. Is there any authority CCCERA relied upon other than the above?
  - e. Do you assert that the CCCERA Board has unfettered authority to make policy decisions, without seeking input and/or approval from its employer members? If so, what authority does the Board rely upon for this conclusion?
2. Under the County Employees Retirement Law, Government Code Sec. 31453.6 provides statutory authority to, on a one-time basis, amortize unfunded accrued actuarial obligations for 30 years, for the purpose of determining employer contribution rates. In making its decision to apply "de-pooling" retroactively to 2002, did the Board consider exercising its authority under Government Code

Sec. 31453.6? If so, did the Board decide that this section was irrelevant or not necessary?

To the extent that the Board responds that no request was forthcoming from the Board of Supervisors, please advise whether, as part of the Board's "de-pooling" decision-making, any discussions have taken place with respect to the Board's powers afforded by the above statute.

### **III. Implementation of "In re Retirement Cases" Limitations on Reportable Compensation**

1. Please identify and list any and all documents, including but not limited to settlement agreements, policy directives, etc. by which CCCERA decided to implement the compensation benefits as identified in the Supreme Court's decision *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4<sup>th</sup> 483, 66 Cal.Rptr.2d 304.
2. Please identify and list any and all non-attorney client privileged documents which the Board considered with respect to whether the Board should adopt, or refrain from adopting, the compensation limitations approved by the Court of Appeal in *In re Retirement Cases* (2003) 110 Cal.App.4<sup>th</sup> 426, 1 Cal.Rptr.3d 790.
3. Please identify and list any Board decision to refrain from adopting the compensation limitations set forth the *In re Retirement Cases* decision.

If none is identified and listed, what was the Board's decision-making procedure, if any, for evaluating the legal impact of the above 2003 Court of Appeal decision? Is it accurate to conclude that the CCCERA Board has voluntarily applied the *Ventura* decision to all then and currently active employee members since that 1997 decision, without imposing the limitations approved by the *In re Retirement Cases* Court?

4. We understand that the Board received a legal opinion on or about October 21, 2009 related to CCCERA's treatment of final compensation and retirement benefits.

Please describe the decision-making process resulting in the Board's policy to implement the Court of Appeal limits on compensation, effective in 2011.

### **IV. Future Decision-making Process**

Please identify the decision-making protocols under which CCCERA currently operates.

Further, we assume that the CCCERA Board will have future policy decisions to consider; these decisions, similar to the those above, may potentially involve significant financial impact on members, including, but not limited to, contribution rates and addressing unfunded liabilities.