

## CALIFORNIA APPELLATE COURT SHINES LIGHT ON PUBLIC EMPLOYEE PENSIONS AS FISCAL TSUNAMI HEADS FOR COAST

By Karl Olson

Public employee pensions are a fiscal tsunami which threaten to swamp many state and local governments. Nowhere is that more true than in California, where a \$425 billion funding shortfall for three state pension systems, and a \$200 billion shortfall for local government pension systems is tarnishing the Golden State's luster.

It's against that background that a Sacramento-based appellate court recently issued a pro-transparency decision, holding that the names, pension amounts and employment history of county employees are matters of public record.

The Court of Appeal's May 11 decision in *Sacramento County Employees' Retirement Association v. Superior Court (Sacramento Bee)*, 2011 Cal. App. LEXIS 569 was in many ways a pension version of the California Supreme Court's 2007 decision in *International Federation of Professional and Technical Engineers Local 21 v. Superior Court (Contra Costa Newspapers)* (2007) 42 Cal. 4<sup>th</sup> 319, which held that public employee salaries are matters of public record.

Just as the Supreme Court in the *Contra Costa Newspapers* case held that a statute exempting peace officer "personal data" from disclosure did not provide an exemption for peace officer names and salaries, the Court of Appeal in the *Sacramento Bee* case held that a law exempting "individual records" from disclosure did not exempt county employees' names, pension amounts and employment history from disclosure.

The "individual records" exemption "protects information provided by a member or on the member's behalf...not all information held by [the agency] that pertains to or relates to the member. The confidential record does not include the name, date of retirement, department retired from, last position held, years of service, base allowance, cost of living adjustment, total health allowance and monthly pension benefit of each retiree. Therefore, the trial court correctly concluded that this information, as requested by the *Bee*, was not protected from disclosure," the Court of Appeal ruled.

The Court of Appeal also brushed aside the pension agency's assertion – backed by a welter of *amicus* briefs from other pension associations and retiree associations – that disclosing named employees' pensions would subject them to identity theft, hostility or danger. The Sacramento pension agency had argued that most of the retirees were elderly and could be preyed upon by scam artists – a questionable assertion since the average retirement age for police officers and firefighters in Los Angeles is 51.

One of the primary drivers of California's pension crisis is a "3 percent at 50" pension formula for safety officers, which gives them 3 percent of their final salary for every year of service. Another problem for the state is the prevalence of "pension spiking," under which employees "spike" the last year salary upon which their pension is based with overtime, vacation cashouts, "uniform allowance," and other one-time enhancements to pay.

The Court of Appeal succinctly rejected the Sacramento pension agency's argument that "publication of individual pensions will harm retirees by exposing them to public hostility, particularly during their 'golden years.'" The Court remarked: "In [the agency's] laudable zeal to protect its members, [it] edges in the direction of 'unsupportable age-based stereotyping.' Simply because many retirees are elderly does not mean they are too frail to weather disclosure of their individual pensions."

As the California Supreme Court had done in rejecting the claim that publication of salaries would expose employees to identity theft, the Court of Appeal turned aside similar claims about disclosure of pensions: "[The agency] has not demonstrated that releasing individual pension information will pose serious danger to its members."

The Court of Appeal's opinion may well have impact beyond California's borders. While there is ample case law holding that public employee salaries are public records, the authority in the area of public employee pensions is less plentiful (although there is an obvious rationale for equating the two). The leading case from other jurisdictions, *Pulitzer Publishing v. Missouri Employee Retirement Systems*, 927 S.W.2d 477, was cited approvingly by the Court in the *Sacramento Bee* case.

It is not entirely clear that the Court of Appeal's ruling in *Sacramento Bee* will be the last word. Similar cases are now before Courts of Appeal in San Diego and San Francisco: the media have filed an *amicus* brief in the San Diego case (which is scheduled for argument June 13), and the *Santa Rosa Press-Democrat* is a party in the fully-briefed San Francisco case. But the Sacramento-based Court of Appeal's exhaustive, well-reasoned 48-page opinion will hopefully prove persuasive to the other courts, and it is very much in harmony with, and faithful to, the California Supreme Court's *Contra Costa Newspapers* decision.

The Supreme Court said it well in the *Contra Costa Newspapers* salary decision: "Openness in government is essential to the functioning of a democracy." That is especially true now in the area of public employee pensions, as Californians are watching libraries, schools and state parks close or cut back services at the same time as pension costs soar. Nationally, there are as much as \$3 trillion in unfunded pension promises made by the states, and in Los Angeles nearly a third of the city's general fund could be consumed by retirement costs by 2015, according to the *Los Angeles Times*. The public has the right, and the need, to know where all that money is going.

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