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Alan R. Burns
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To: Allan Roeder, Interim City Manager

From: Alan R. Burns

Date: February 19, 2015

Re: Lawfulness of Barlag Settlement Agreement

I was retained to provide an opinion whether the Barlag settlement agreement was lawfully entered into and whether it is a lawful contract.

FACTS

Broadwater was the Mayor of the City and his son, Jeremy, was hired to be a firefighter. A dispute arose in the City about the relationship and about whether Jeremy was qualified to be a firefighter. The Union generally disapproved of his employment and became involved in the recent City Council election.

Matt Fertel was the City Manager. Dave Barlag was the Fire Chief. The City had a nepotism rule that might be read as prohibiting favoritism based on nepotism, but also requiring that persons who are related to other employees not be discriminated against. The Fire Chief interpreted the rule that way and believed that Jeremy was being unfairly discriminated against by Union members. He caused a hiring procedure to be modified to cure the unfairness. That modification caused him to be the object of the Union's enmity as the Union believed he was manipulating the process to ensure that Jeremy passed probation.

The hiring of Jeremy Broadwater ultimately led to a "no confidence" vote of Barlag by the Union in mid 2014 and the Union began demanding that Barlag be investigated. Management Partners was hired and did an internal analysis of the department (not an investigation of Barlag) and concluded that there were problems at the Department. The report concluded that the Fire Chief was weak and the Union strong. The Union then began lobbying the Council and City Manager to fire the Fire Chief.

The Fire Chief believed he would be fired for following the law (i.e. the City's policy prohibiting discrimination in hiring) and sought legal representation. He retained Craig Scott, an employment lawyer with a solid reputation. The Fire Chief informed the City Attorney he would bring a lawsuit if he was terminated, believing he would be fired for following the law. The City Attorney believed that Barlag would do so. The City Council then began meeting in closed session based on "threatened litigation". A contemporaneous handwritten note by the City Attorney was used as the basis for holding a closed session under the "threatened litigation"

exception and it was made part of the record at some point.

Barlag made it known that he was not ready to retire and wanted to work eight more years. The closed sessions resulted in a settlement agreement in which Barlag agreed to resign as Fire Chief and was allowed to work two more years as the City's Public Safety Administrative Officer. As part of the settlement he waived his right to sue the City.

The District Attorney is now conducting an investigation into the legality of the agreement.

ISSUE

Was the settlement agreement lawfully entered into and supported by consideration, or was the settlement agreement a gift of public funds?

ANALYSIS

While it is difficult to predict what the District Attorney will investigate and what possible theories of unlawfulness will be focused on, this memo will focus on whether there was consideration for the agreement and whether it was lawfully entered into.

Contracts must be supported by consideration. There must be a public purpose to not be a gift of public funds. There have been a few cases involving settlements that outline the law in this area.

(a) Was Settlement of the Potential Litigation Sufficient for Consideration?

In *Orange County Foundation v. Irvine Co.* 139 CA3d 195, 188 Cal.Rptr. 552 (1983) the Court of Appeal had occasion to review a settlement agreement involving tideland islands. The settlement resulted in the state paying money to the *Irvine Company* for those islands. A taxpayer challenged the settlement, contending that the settlement was not for a public purpose but was a prohibited gift of public funds. The taxpayer contended that the islands involved in the settlement were always tidelands and submerged lands protected by the public trust in which the *Irvine Company* had no disputable interest.

The *Irvine Company* correctly asserted the law:

“The settlement of a good faith dispute between the State and a private party is an appropriate use of public funds, neither wasteful within the meaning of section 526a, nor a gift barred by article XVI, section 6, because the relinquishment of a colorable legal claim in return for settlement funds paid by the State is good consideration and accomplishes a valid public purpose.”

The court noted that although that was a correct statement of the law, that the pleading filed by the taxpayer alleged that *Irvine* “knew” that the islands in question were tidelands and was aware it had no legal claim to them. The Court found that if the plaintiff could prove that *Irvine* knew it

had no claim, it would prevail because “[A] promise to compromise a claim utterly unfounded will not be regarded as a valuable consideration.” [Wharton on Contracts].” (*City Street Improvement Co. v. Pearson*, 181 Cal. 640, 185 P. 962, overruled on other grounds in *Hoffman v. City of Red Bluff*, 63 Cal.2d 584, 593-594, 47 Cal.Rptr. 553, 407 P.2d 584, 593-594, 47 Cal.Rptr. 553, 407 P.2d. 857.)

In specifically addressing the gift of public funds issue, the Court provided the following:

“It is well settled that the primary question to be considered in determining whether an appropriation of public funds is to be considered a gift is whether the funds are to be used for a public or private purpose. If they are not to be used for a public purpose, they are not a gift within the meaning of this constitutional prohibition. (*County of Alameda v. Janssen*, 16 Cal.2d 276, 281 [106 P.2d 11].) ‘The benefit to the State from expenditure for a “public purpose” is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefited therefrom.’ (*id.*, at p.281 [106 P.2d 11].) “Thus, in order for payment under the contracts here involved to constitute an appropriation of public money in violation of article IX, section 8 [prohibiting the expenditure of state funds for support of private schools], and the payment must be without adequate consideration.” (*California Teachers Assn. v. Board of Trustees*, (1978) 82 Cal.App.3d 249, 257, 146 Cal.Rptr. 850, italics added.)

In *California Teachers Assn.*, the Court found the expenditure lawful, because it was supported by adequate consideration, namely, a “public purpose” was found. In *Irvine*, however, the Court said the issue was whether the payment of funds was so utterly lacking as to make the payment not for a “public purpose.” The *Irvine* court found if state funds were expended for a claim that was wholly invalid, there was inadequate consideration to support a contract, no public purpose was served, and the payment is a gift of public funds.¹

While *Irvine* sets out the tests that must be applied, a more recent and relevant case is provided in *Page v. Mira-Costa Community College District* (2009) 189 Cal App 4th 471, 102 CR3d 902. That case specifically pertained to whether an employment settlement agreement over potential legal claims was a gift of public funds.

In *Page*, a settlement agreement between a former president/ superintendent of a community college district and the district was challenged by a taxpayer as being a gift of public funds. The case turned on the fact that the settlement was for a cash payout of an employment contract which was in excess of what was allowed by Government Code sections 53260 and 53261. The Court held that the settlement agreement was illegal because the settlement amount was in excess of what was authorized by Government Code sections 53260 and 53261. While the case turned on the above statutes, it provides the most relevant discussion of the law on whether a settlement agreement in the context of an employment dispute is a gift of public funds, and when

¹ The summary judgment was reversed in favor of Irvine and the case was sent back to the trial court for trial. But the taxpayer was required to prove that the parties knew (state of mind) that they had an invalid claim.

sufficient consideration is provided such that it is not a gift of public funds.

The facts in *Page* are important. Richart was the superintendent and president of the college. She was hired in 2004, received high ratings, and her original contract was extended for an additional four year term. In the summer of 2006, in response to a whistleblower's report, she initiated an investigation of alleged financial mismanagement of the Horticultural Department. She reported the matter to the District Attorney and the person found responsible for the mismanagement was charged with, and pled guilty to fraud. Thereafter, a secret vote by some college faculty members who were unhappy with her actions resulted in a vote of no confidence.

In 2007, the investigation, and Richart's role in it, became increasingly controversial, resulting in complaints by the academic senate's president and council about her lack of leadership. The Board's president, however, issued a letter of support for her. Large numbers of employees began attending Board meetings to complain about Richart. On Feb 1, 2007, three Trustees issued a "minority response" that addressed and criticized the Board's responses and sided with the faculty members.

Richart met the next day with the Board president and District Counsel. In a letter dated that day she indicated that she believed the "minority response" had undermined her office and the Board's ability to work together and constituted a violation of her due process rights. She stated that it might be in her best interest to reveal past misconduct at the college that occurred before her arrival. The Board president at the same time wrote to the other trustees stating that the minority trustees had violated Richart's due process and privacy rights and those public evaluation statements should not have been made in public.

Later that month one of the minority trustees, during a public hearing, read aloud portions of Richart's letter and berated her. One of the trustees expressed that Richart appeared to be threatening a public official. Another Board trustee expressed that the minority's actions were legally improper and put the District at a grave litigation risk.

Richart thereafter retained attorney Robert Otilie to evaluate her claims against the individual trustees. Trustees met on at least two occasions with the District's claims adjuster, who indicated he thought there was a significant threat of litigation. A retired judge was retained as mediator over the dispute. Otilie and District Counsel discussed the matter with the mediator and a closed session was set up with the Board. A closed session was then held over anticipated litigation. The retired judge actually participated in the closed session process and the settlement was reached. In the settlement Richart agreed to step down from her position as superintendent/president and serve as a consultant for 18 months. The settlement provided that Richart was to be paid \$3,150 per month plus health benefits, and she was to be paid \$43,500 in attorneys' fees, and \$650,000 in "damages."

Page, a taxpayer, wrote the District and alleged the settlement agreement violated the Brown Act and demanded that the District cure the violations. The settlement agreement was nevertheless approved and *Page* filed a petition for writ of mandate claiming a violation of the Brown Act, gift of public funds and waste.

The Court of Appeal found that the settlement violated Government Code section 53260 in that the maximum cash settlement amount exceeded the formula set forth in that statute which limited payouts to eighteen (18) months wages. First it determined that the section applies to buyouts of “contracts.” The Court found that limiting the provision to buyouts of contracts was consistent with the statutory scheme and that for non-contract claims, a Government Claims Act claim might need to be filed. The Court noted that Richart was free to pursue a settlement of her dispute within the limits of Government Code sections 53260 and 53261, or to pursue a claim for money damages.

As to the cause of action for waste/illegal gift of public funds, *Page* contended that because the District had not taken any adverse employment action against Richart, who had received majority support from the Board, that the settlement was illegal. The District argued that the payment was made in good faith settlement of a dispute, as evidenced by hiring the retired judge to act as mediator. The deposition testimony in which Richart testified about her emotional distress, damage to reputation, and being no longer able to obtain a job in education was also asserted to show good faith, as was the retired judge’s evaluation of the case as being worth Two Million Dollars.

The Court then reviewed the test for whether the payment of public money is to be considered a gift:

“[t]he settlement of a good faith dispute between the state and a private party is an appropriate use of public funds and not a gift because the relinquishment of a colorable legal claim in return for settlement funds is good consideration and establishes a valid public purpose. [Citation]. The compromise of a wholly invalid claim, however, is inadequate consideration and the expenditure of public funds for such a claim serves no public purpose and violates the gift clause.” (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450 [123 Cal.Rptr. 2d 122], city *Orange County Foundation v. Irvine Co.* (1983) 139 Cal.App.3d 195, 200 [188 Cal.Rptr. 522] (*Orange County Foundation*)). In *Orange County Foundation*, the Court of Appeal reversed the grant of summary judgment on a taxpayer’s gift clause action stemming from a settlement between a private party (Irvine) and the state because the motion did not directly address Irvine’s knowledge of the validity of its claim, and the denial of the taxpayer’s allegations would have left a disputed, triable issue in any event. (*Orange County Foundation*, at p. 201). The Court held there was a triable issue as to “whether the *Irvine Company*’s compromised title claims to certain islands were knowingly spurious.” (*Id.* p. 198).

The taxpayer’s action alleged that the payments constituted “waste” of public funds. The Court also outlined what constitutes “waste” under CCP 526a:

“[T]he term “waste” as used in [Code of Civil Procedure] section 526a means something more than an alleged mistake by public officials in matters involving

the exercise of judgment or wide discretion. To hold otherwise would invite constant harassment of city and county officers by disgruntled citizens and could seriously hamper our representative form of government at the local level. Thus, the courts should not take judicial cognizance of disputes which are primarily political in nature; nor should they attempt to enjoin every expenditure which does not meet with a taxpayer's approval. On the other hand, the court must not close its eyes to wasteful, improvident and completely unnecessary public spending, merely because it is done in the exercise of a lawful power." (*Sturgeon v. County of Los Angeles, supra*, 167 Cal.App.4th at p. 639, quoting *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1138-1139 [232 Cal.Rptr.814, 729 P.2d 901].)

The Court found that the District was not entitled to summary judgment on the cause of action for gift of public funds since the payments exceeded the maximum permissible for the buyout of an employment contract. The Court noted that whether or not the agreement was supported by consideration should be determined by the trier of fact and not decided on a summary judgment.

The court also found that the constructive discharge claim should also be heard by the trier of fact. Richart contended that a termination occurs when a reasonable person has been subject to such intolerable conditions as to justify her resignation. The essence of the intolerable conditions requirement of a viable claim for constructive discharge is whether, under all the circumstances, the working conditions are so unusually adverse that a reasonable employee would have felt compelled to resign. The working conditions must be unusually aggravated or amount to a continuous pattern before the situation will be deemed intolerable, a poor rating or demotion by itself will not suffice. The determination of whether a reasonable employee would have been compelled to quit is essentially a jury function. (Citing *Thompson v. Tracor Flight Systems, Inc.*, (2001) 86 Cal. App. 4th 1156 [104 Cal. Rptr. 2d 95] at 1170-1171.)

Like the settlement agreement in *Mira-Costa*, the settlement agreement in this case involved a situation in which the incumbent of a position found working conditions intolerable and believed termination was likely. As in *Mira-Costa*, the employee hired a very capable employment attorney and threatened to sue, and the attorney then crafted the settlement agreement. In *Mira-Costa*, the President/Superintendent was a contract employee, while Barlag was not and had no employment contract.

Mira-Costa found that the settlement agreement was invalid mainly because it violated the provisions of Government Code sections 53260 and 53261 in that the settlement agreement constituted a separation or severance agreement that was prohibited by those sections for persons with an employment contract. Barlag did not have an employment contract and was not given severance pay, but was required to work for the money, in effect, taking him out of his Chief position and putting him in the City's Public Safety Administrative Officer position. He is performing work in that capacity, and as was intended, is providing services related to the new fire station reconstruction and related to the conversion of the radio system (800 MHz).

In *Mira-Costa* the Court was dubious of the constructive discharge claim in that the

President/Superintendent continued to enjoy majority support of the Board. The Court found that only a jury could make a determination as to whether a reasonable employee would feel compelled to quit. In the instant case, the City had authorized a management study and the study indicated that the fire department had problems, and that the Fire Chief was weak and the Union was strong. Under these circumstances it is my belief that a reasonable employee would have believed his days in his job were numbered. If he believed he was being terminated because he enforced the anti-nepotism policy so that persons related would also not be discriminated against, he would have a legitimate belief that he was being terminated for following the law.

(b) Is the Agreement Supported by the Consideration of Barlag's Providing Special Services as the City's Public Safety Administrative Officer?

In addition to any consideration flowing to the City by way of resolution of litigation threatened by Barlag, there was independent consideration to the City provided by Barlag's performing services as City's Public Safety Administrative Officer. He is required to perform the duties of the position's job description for as long as he holds the job. In addition to the duties of the job description that has been developed, he has been tasked with assisting in providing services related to the new fire station reconstruction and providing services related to the conversion of the 800 Mhz radio system.

In *Winkelman v. City of Tiburon* (1973) 32 Cal App 3d 834[108 Cal. Rptr. 415] the Court held that for a public contract to be valid (i.e., not a "gift of public funds") it must be supported by "adequate consideration." The Court held that while the consideration must be more than "nominal," the law does not require a weighing of the quantum of benefit received by the promisor or the detriment suffered by the promisee.

In *Avan v. Municipal Court*, (1965) 62 Cal. 2d 630, 401 P.2d 227[43 Cal. Rptr. 835], the Court found that there was no gift of public funds when services are rendered for compensation. In *Johnston v. Rapp*, (1951) 103 Cal. App. 2d 202, 229 P.2d 414, the Court found that there is wide legislative discretion in setting salaries for local employees as long as it is compensation for services to be performed. Changes in compensation based on changes in duties were specifically approved as providing legal consideration.

Based on the above authority, it is clear that independent consideration is provided by Barlag's agreement to provide services as the City's Public Safety Administrative Officer. In addition to the duties specified in the Public Safety Administrative Officer position description, it is clear that there are two duties that he was to perform and is apparently performing. One related to the construction of a new Fire Station Headquarters (which he might be uniquely qualified to provide advice on) and the other with regard to the replacement of the radio system, of which he must also be very familiar. The decision to pay Barlag the compensation he requested was a matter of legislative discretion, which will be deferred to by the courts.

Brown Act Issues

The District Attorney is also looking into whether a Brown Act violation occurred in the way the settlement agreement was reviewed and approved in closed session. While my task was focused on reviewing the validity of the contract, the sequence of events leading to the approval of the agreement bears mention. The original closed session minutes described anticipated litigation with Dave Barlag (August 12, 2014). The August 26th agenda also described that two anticipated litigation matters were being discussed and the minutes mention Barlag by name. The September 23rd agenda mentioned one anticipated litigation matter and the minutes mentioned Barlag by name. The November 25th City Council meeting had the Settlement Agreement on the open agenda for approval. The "threat note" was made available for public disclosure.

The above shows a good faith and substantial effort to comply with the Brown Act and to be transparent. The fact that litigation was being considered with Barlag was clearly stated, and the Brown Act notice provisions are designed so that potential litigation can be known by the public, and also that any settlement of that potential litigation will be subject to public scrutiny after the settlement is reached.

Conclusions

1. The settlement agreement is supported by valid consideration and is not a gift of public funds. In addition to the settlement of potential litigation, Barlag is performing services in exchange for the money he is being paid. The settlement was not a severance agreement and did not violate Government Code sections 53260 and 53261.
2. The Brown Act was substantially complied with and there was transparency in identifying that there was potential litigation with Barlag and a settlement agreement.
3. There was no specific intent to violate any law. To the contrary, the above shows a good faith intent to comply with the law.

Respectfully submitted,

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