IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

CONTRA COSTA COUNTY DEPUTY SHERIFFS' ASSOCIATION, et al,

Plaintiff,

vs.

CONTRA COSTA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, et al,

Defendants.

_____/

and related complaints in intervention and petitions pending in other Courts for which consolidation has been ordered.

_____/

No. N12-1870

DECISION UPON PRELIMINARY ISSUES

The Court in this Preliminary Opinion addresses the issue of whether or not some of the practices being followed by the respondent boards in determining "compensation earnable" and "final compensation", as defined in Government Code §§ 31461 and 31462, were unauthorized by law prior to the enactment of AB 197 (amending Government Code § 31461) so as to possibly prevent "legacy employees" from having a vested right to having their retirement calculated by the method being used prior to AB 197. The matter comes before the Court with the following history:

Procedural Background

This matter commenced with the filing by the Contra Costa County Deputy Sheriff's Association, the United Professional Fire Fighters of Contra Costa County, Local 1230, and two individual members of such associations, of a Petition seeking Mandate barring Respondent from implementing the provisions of AB 197 as it might apply to employees whose employment commenced before January 1, 2013, the effective date of the legislation. Respondent Contra Costa County Retirement Board appeared in response and indicated that it took no position as to which employees, if any, may or may not have "vested" rights. The parties to the petition stipulated to an order staying implementation of AB 197 as to such employees while these proceedings were pending and based upon an informal analysis of the economic impact of such a stay the Court acquiesced and granted the stay.

Various other employee representative entities and representative employees filed petitions to intervene in these proceedings and those requests were granted. At the Court's request notice was given to the employer government entities involved and the Office of the Attorney General. The latter appeared by filing a petition of intervention essentially opposing the position of the petitioners that any mandate should issue in favor of such "legacy employees".

Subsequently, the State brought a motion to consolidate similar cases that were pending in Alameda, Marin and Merced Counties. The motions were contested.

All sides agreed, however, that the motion was properly before the Court.[1] The Court found that common issues of fact and law were such as to justify coordination in one Court, for judicial economy, and it was so ordered. [2]

Case Management Order #1

The parties worked with the Court to develop a strategy to define the issues that needed to be determined by the Court in these proceedings and whether there were factual disputes that would need to be determined by trial. The preliminary view was that the facts could be agreed upon and we moved forward to develop Case Management Order #1 which provided for a "Phase I" briefing and hearing to determine the first issues. As the briefs were filed in became clear that the Court it would have to determine whether the practices of the retirement boards, prior to enactment of AB 197, were authorized by, or in conflict with, the statutes making up CERL. The State takes the position that the practices at issue were clearly not allowable under CERL and Petitioners take the position, joined by the Contra Costa, Alameda and Merced retirement boards, that CERL gave each of the boards

1 The parties concluded that the issues before the Court were certainly "complex" but acquiesced in the State's position that the action was not presumptively complex under Calif. Rule of Court 3.400 (c) and upon analysis the Court agreed that it would not be necessary to determine any of the matters complex pursuant to CRC § 3.400. The parties recognized that the issues before the Court were time sensitive and the time involved in proceedings with the Administrative Office of Courts and the JCCP program would be a determent. The Court concluded that it had authority to consolidate the actions as provided by CCP §403.

2 The inclusion of the Marin action came with a limitation. The assigned judge in that County had sustained a demurrer to the petition filed there without leave to amend and the petitioners had filed a motion for reconsideration. If the reconsideration were denied there would be no reason to coordinate as the action would not be active. Petitioners filed an appeal and sought from the Court of Appeal writ relief. This Court understands that an alternative writ was issued and the outcome of the request for writ relief is pending. Accordingly, this Court has indicated that it will not proceed regarding that petition while the Marin action is in that status.

discretion to include in “compensation earnable” and “final compensation” the amounts that they have been including.

The issue of “timing”

To a large extent the dispute between the parties relates to the inclusion of monies that are indisputably “compensation” but which represent “cash outs” of such unused items as vacation, annual leave, personal leave, sick leave and compensable time off. The dispute is as to payments that have been included in the calculation of “compensation earnable”, and thus in “final compensation”, even though the employee became entitled to take the “time off” in a period of time other than the final compensation window. The practice of collecting a “cash out” of unused time that became available in years prior to the final compensation period, and in some cases amounting to substantially more than could be available in the single period, has recently been described by the term “pension spiking”. Whatever the jargon, however, this Court is simply tasked with determining what method of pension determination, if any, has become a “vested right” of those in employment prior to January 1, 2013.

Government Code § 31461

The law pursuant to which the retirement boards here involved manage pensions is found in sections 31450 through 31898 of the Government Code, provisions of the County Employee Retirement Law of 1937, commonly referred to as “CERL”. Section 31461, prior to AB 197, read as follows:

> " 'Compensation earnable' by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay. The computation for any absence shall be based on the compensation of the position held by the member at the beginning of the absence. Compensation, as defined in Section 31460, that has been deferred shall be deemed 'compensation earnable' when earned, rather than when paid".

The State urges that there is no ambiguity in these provisions and that, pursuant to the last sentence of the section the boards were unable to include in final compensation any "cash out" of leave time, or other compensation rights, that were not earned in the period of employment chosen by the retiree for the calculation of his or her monthly retirement payment. [3] Petitioners argue that the last sentence is to be narrowly construed to refer only to compensation that is deferred for tax purposes such as contributions to a 401K plan, and, in any event, the statute is ambiguous which leaves to the board a determination as to what is "compensation earnable" that is to be included in "final compensation".

This presents to the Court the task of statutory interpretation. In interpreting legislation the Court is required to first determine the ordinary meaning of the words used in the statute. "If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the

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3 As the parties acknowledge this varies as to whether a period of one year is used or a period of three years. In order to protect the employee against a reduction in compensation the employee may chose the period of greatest compensation; the last year (or last three) will be used if no other selection is made.

language governs' ".Ventura County Deputy Sheriffs' Association vs. Board of Retirement (1997) 16 Cal.4th 483, 492, citing Lennane v. Franchise Tax Board (1994) 9 Cal.4th 263, 268. This rule is likewise expressed by the Legislature in Code of Civil Procedure § 1858 which directs that the courts are not to "insert what has been omitted, or to omit what has been inserted".

This Court finds no ambiguity in the meaning of § 31461. A clear purpose of both the full statute and its last sentence is to prevent the "spiking" that is here at issue. As discussed below, we know from the Supreme Court decision in Ventura County Deputy Sheriffs' Association vs. Board of Retirement, *supra*, 16 Cal.4th 483, 505, that the cash-out of leave time is both "compensation" and "compensation earnable". It is clear from the language of § 31461 when it is earnable as well, for the statute refers to compensation for an "absence" to be based upon the compensation at the beginning of the absence. In other words, the right to "time that is paid without work" is compensation. Webster's Dictionary defines "earn" as "to merit or deserve, as by labor or service". Ventura tells us that it is by this earning of the right to be paid without work that we must include the cash-out as "compensation". Accordingly, the employee has "compensation" when he is granted the right to take time off and still be paid and therefore that is when it is "earned". The last sentence of § 31461 tells us that it is "earnable" at the time when the employee incurs the right, not at the time of the cash-out. Compensation can only be "earnable" at one time; it cannot become "earnable" again and again.

This ordinary meaning of the final sentence of § 31461 is consistent with the

usual and normal expectations of our society regarding employee pensions. As employees age our populous recognizes the need for that person to continue with a standard of living at or reasonably close to that while working but recognizes that it is no longer necessary for the retiree to be building a healthy nest. And yet if this Court were to adopt the position of the petitioners that the Legislature intended that pensions could be adjusted upward by compiling leave time accumulated and including it as the average compensation in his or her "final compensation" computation period, the possibility of a pension greater than what the employee was regularly earning would result. This Court finds no evidence that the Legislature had such an intention. At least one appellate court has addressed the deviation from statutory intent that such distortion would allow. Hudson v. Board of Administration of the Public Employees' Retirement System (1997) 59 Cal.app.4th 1310, 1321-3.

Even were § 31461 ambiguous, little if any support can be found for the petitioners' proposition that the final sentence of § 31461 was intended by the Legislature solely for only a narrowly defined purpose. The proposal of petitioners that "compensation that has been deferred" was intended to only refer to monies put aside in a tax saving plan, such as a 401K plan, is found in In re Retirement Cases (2003) 110 Cal.App.4th 426, 475, based upon a comment by Judge Pollak that "on its face" the sentence might apply to payments made to a deferred compensation plan. Both Judge Pollak and the Court of Appeal, however, disregarded that comment by finding that for the issue before that court § 31461 has no application. It is the view of this Court that such *dicta* misses the main point; the words of the Legislature are to

be given their ordinary meaning. The 'deferred compensation plan' theory fails, in the view of this Court, because under no set of tax laws that exists today, or has existed in the relevant time, was an employee allowed to deduct from his or her taxable income an amount of compensation earned in a different year than the year of the tax return. Thus, the existence of the possibility referred to by petitioners that the Legislature intended only to refer to this type of "deferred compensation" is not feasible.

More importantly, the determination of when compensation is "earnable", as applied to accrued leave time, does not depend upon the wording of that final sentence. Standing alone the other provisions of the section do not lead to the conclusion that the Legislature intended that employees could save up all of their leave time and add the value of that total in determining their 'average' compensation during the final compensation period.

Were the Court to determine that the statute contained an ambiguity that must be interpreted, it would, in any event look to legislative history of the section itself, legislative history of all of CERL, case law that has addressed the issue, comparative legislation, and any other factors that the Legislature might have been considering when the legislation was drafted. None of these support the interpretation proposed by petitioners.

Case Law prior to AB 197

In Ventura County Deputy Sheriffs' Association vs. Board of Retirement, *supra*, 16 Cal.4th 483, the California Supreme Court issued what is considered a landmark decision in the area of county government pensions. In overruling at least one Court of Appeal decision [4] the Court held that bonuses, incentives, and other forms of compensation [5], so long as they were available uniformly to all employees in a job classification, were "compensation earnable". There can be no dispute that following the issuance of that opinion a great number of retirement boards were challenged for having followed the Guelfi narrow definition of "compensation earnable" resulting in a number of renegotiations, modifications, settlement, and sometimes litigation.

What is clear, however, is that in no manner did the Ventura court address the issue of timing that is before this Court today. Indeed, there is no suggestion in any part of the opinion that the items in Ventura County that had been held out of the determination of "compensation earnable" were earned by any challenging employee at any time other than within the period for which "final compensation" was calculated.

Petitioners erroneously suggest that the Ventura opinion recognized the

4 Guelfi v. Marin County Employees' Retirement Association (1983) 145 Cal.App.3d 297, discussed *infra*.

5 The items under consideration in Ventura included bilingual premium pay, a uniform maintenance allowance, educational incentive pay, pay in lieu of annual leave, and field training officer bonuses, amongst other things.

position that they are taking which allows accumulation of earned leave to be cashed out in the final compensation period and therefore included in "final compensation". They refer specifically to footnotes 6 and 11 of the opinion. Those footnotes, however, simply advise the reader as to what the practices of Ventura County were as to compensating the employee, not calculation of "final compensation".

It needs to be understood that the issue of whether the counties or involved agencies can, by their collective bargaining agreements, agree to allow a multi-year calculation of accrued leave to be cashed out all in one year, is not before this Court. Indeed, there has been no suggestion that such practices are improper. The only issue here before the Court is whether or not the law allows that entire cash-out payment to be "spiked" into the employee's lifetime retirement payment.

The Ventura court declined to consider whether its decision should have retroactive application. The issue of retroactivity was the topic of a number of actions filed as to the 20 retirement boards operating under CERL and those cases were consolidated, pursuant to CCP § 404, before Hon. Stuart Pollack of the San Francisco Superior Court. His decisions were appealed (by both sides) resulting in the substantial decision issued by the First District Court of Appeal entitled In re Retirement Cases (2003) 110 Cal.App.4th 426 which held that Ventura was to be applied retroactively.

In re Retirement Cases also addressed the issue of whether accrued leave should be included in retirement calculations. The issue before it, however, was quite the opposite from that before us here. The petitioning employees in those

proceedings had not cashed out their accrued leave in their final compensation period, but rather had taken it as "termination" pay. Without having to determine when the right was earned or earnable, the Court merely interpreted the statute which it found quite clearly prohibited such pay from being included in "final compensation".

In Salus v. San Diego County Employees Retirement Association (2004) 117 Cal.App.4th 734, petitioning employees sought to obtain a different result for sick leave cash-outs that they were granted as incentive to remain employed during a transition which would eliminate their positions. The Court rejected their position stating "such one-time post-termination payments cannot be considered part of final compensation without creating the risk of substantial distortion in the retirement benefits otherwise payable to employees". Salus at p.741. In a realistic sense, granting the employee the right to manipulate his or her pension by cashing out leave time earned over a longer time than the final compensation period would result in the same distortion. [6]

Petitioners rely upon the decision in Guelfi v. Marin County Employees' Retirement Association (1983) 145 Cal.App.3d 297. Like Ventura and In re Retirement Cases the Guelfi court was not called upon to determine any timing issue and did not address it. While the facts before that case indicated a dispute as to

6 The Salus court made reference to the comparison of CERL provisions to PERS requirements. Both sides address that issue here but it is not relevant in that there is no need in analyzing PERS to determine when leave is includable because under the applicable provisions state employees cannot include any unused leave in the calculation of their final compensation.

whether or not the retirement board was *required* to include certain items as compensation, there is no reason to draw an inference, one way or the other, as to whether the Guelfi court believed that CERL allows a retirement board to include as "compensation earnable" items not intended to be allowed by the legislation.

This Court rejects the proposal of petitioners that the wording of the definition of "compensation earnable" as "the average compensation as determined by the board…" was intended by the Legislature to give each board carte blanche authority to add whatever items it wished to the calculation. By ordinary meaning the Legislature simply directed each board to make the mathematical determination of 'average' compensation. No appellate court has based a decision as to the calculation of "compensation earnable" upon a contrary conclusion.

The position of the petitioners on this point is troublesome; they seem to be of the view that retirement boards are highly restricted unless making a determination that favors the employee. Indeed, in Guelfi the appellant retirees urged the appellate court that boards were not entitled to "determine which elements of compensation are to be included or excluded" and that the board could only make a "rudimentary calculation (Guelfi at p.304). Likewise in Ventura the employees urged that the Board could not determine that the questioned items were not "compensation earnable" as such was beyond its discretion. Even with recognizing that the pension laws are to be liberally construed in favor of employees (Ventura at p.490), the employee side of these actions cannot have it both ways.

In County of Marin Association of Firefighters v. Marin County

Employees' Retirement Association (1994) 30 Cal.App.4th 1638, the retirement board sought to rely upon the Guelfi statement that it had the authority to determine whether or not holiday pay not included for a number of years should be included retroactively. The Association of Firefighters was successful in denying that interpretation and the court ultimately held that retirement boards do not have the "discretion" to determine whether an element is a part of "compensation earnable". As that Court indicated, if such were the rule it would have been unnecessary for the Guelfi court to determine which items met the definition (Marin at p. 1646).

The decision in Oden v. Board of Administration (1994) 23 Cal.App.4th 194 is significant in this regard. At issue were certain varying policies of the PERS board in including in or excluding from pension calculations pension contributions by the employer ("pick-ups") that were by collective bargaining MOUs agreed to be "as if" paid by the employer. What is significant for our determination here is the Appellate Court's determination of who is empowered to interpret the statutes:

> "The Board's distinction among employer-paid member contributions rests entirely upon the characterization elected in bargaining agreements and is untenable because public agencies are not free to define their employee contributions as compensation or not compensation under PERL---the Legislature makes those determinations. Statutory definitions delineating the scope of PERS compensation cannot be qualified by bargaining agreements. (*Service Employees International Union v. Sacramento Unified School District (1984) 151 Cal.App.3d 705, 709-710.)"*

The Oden court went on to interpret the relevant statute (overruling the trial court interpretation) using the traditional rules of statutory interpretation. Indeed, that is

what the courts did in both Ventura and In re Retirement Cases.

The decision in Santa Monica Police Officers' Association v. Board of Administration (1977) 69 Cal.App.3d 96 is consistent with the analysis that this Court has made. While the opinion denied inclusion (pursuant to PERL) of an entire lump sum payment for accrued sick leave, that court acknowledged that the award to the employee is of time (non-monetary compensation) and that viewing the retirement system as a whole inclusion of amounts accrued over a lengthy period of time "would totally distort the legislative scheme". (pgs 100-101).

Legislative History

Petitioners appear to allege that support for their position is found in the legislative counsel digest for the 1993 and 1996 amendments to Section 31461, which include the phrase "deferred compensation" in the description of that language. (See, e.g., Petitioners' RJN Exh. N (relating to AB 1659 effective 1993), Exh. S (relating to SB 226 effective 1996).)

Though the phrase "deferred compensation" is used in those legislative digests, there is nothing in the plain language of the statute or the legislative history to support the conclusion that the phrase "compensation that has been deferred" refers *only* to items commonly referred to as deferred compensation. Indeed, the Govenor's Bill Report relating to SB 226, which was the basis for the 1996 amendment to CERL, notes that the purpose of that last sentence of Section 31461 was " to prevent employers from purposely delaying payment of certain benefits until the final year of employment in an effort to increase the dollar amount of employees

(sic) final compensation." (State's RJN Exh. 14, p. 3; See also State's RJN Exh. 15, p. 2.) This summary suggests that the "deferred" compensation items are not just tax-deferred compensation but also any pay item that an employer can purposely delay paying until the final year of employment.

The legislative comments to AB 197 further support the conclusion that this sentence added to Section 31461 and made applicable to all counties in 1996 was intended to limit compensation earnable to that which was earned and payable in the final year. AB 197 was introduced after AB 340 (PEPRA) to clarify that the intent of PEPRA was to make changes that were consistent with existing law. (See State's RJN Exhs. 9, 11, 12.) Specifically, the commentary states that the changes are consistent with case law existing since 2003, which limited the definition of "compensation earnable" to compensation that was "earned in a year." (State's RJN Exh. 9, p. 2; See also State's RJN Exhs. 11, 12.)

Settlements and Trial Court Litigation

In their joint brief filed herein the Contra Costa County Employees Retirement Association and the Alameda County Employees Retirement Association urge the proposition that the respective associations have the authority to enter into settlements with employees or retirees as to disputed issues regarding inclusion or exclusion from "compensation earnable". To place that argument in context it is necessary to review the scope of the determination that is being made in this preliminary context. The ultimate issue before the Court is whether the legislation contained in AB 197, which is not here argued to be ambiguous, can be applied to

those employed prior to its enactment. The issue of past authority of the associations is limited to a determination as to what the law was prior to January 1, 2013. That issue, as indicated above, is for the judiciary and not for the retirement boards.

That is not to suggest that the position of the associations as to entering into settlements is to be ignored. Indeed, that may play an important role in the determination of whether some or all 'legacy employees' have vested contractual rights to the methods used before AB 197. Consideration of the effect of those settlements will therefore be held for consideration until a determination of the vesting issues is made.

In the *MERCED* action there appears to be more than a settlement. Litigation went forward and a Superior Court Judge in that county made certain determinations in a written decision attached to the brief filed on behalf of the Board of Retirement of the Merced County Employees Retirement Association, of which this Court will take notice. Complicated issues are raised as to the unique situation raised in that briefing including the fact that the practices in Merced County have been in some ways substantially different in terms of having two separate pay codes, one for "vacation payoff, first 160 hours only" and one labeled "annual vacation sellback".

It is unclear to this Court as to whether the Merced Superior Court was asked to, or did, take into account the timing of the earning of vacation time that was cashed out although on its face it does appear that both the settlement that was the subject of the action and the decision use a method that considers the date of cash out, rather than of vacation accrual, as is used for determining "compensation

earnable" included In "final compensation". The Court in that proceeding was, in any event, not interpreting CERL but rather determining the meaning of a settlement agreement.

In any event, this Court does not consider the judgment in that matter to be either *res judicata* or *collateral estoppel* as to employees who have not yet retired and were not parties to the Baker litigation in that county. The Court will consider, under the topic of vesting, both the settlements and the litigated judgment.

Finally, while it is not binding upon petitioners in the determination of this issue, it is significant that both in 1997 and in 1999 counsel for the Contra Costa County Retirement Board specifically opined to their said client that leave time not earned in the final compensation period could not be included. Morrison & Foerster opinion letter of November 24, 1997 [Exhibit D of the First Amended Joint Statement of Stipulated Facts] and Reed Smith opinion letter of October 21, 1999 [Exhibit E of the First Amended Joint Statement of Stipulated Facts].

Issues Other Than Timing

The foregoing discussion covers items "1" and "2" of the Phase I issues pursuant to Case Management Order No. 1. These items cover Subsections 1(C), 2 and 4 of subsection (b) as added to Government Code § 31461 by AB 197.

(a) Item "3" for Phase I. This item addresses the exclusion from "compensation earnable" of "payments for services rendered outside normal working hours during the final compensation period" [subsection (3) of subsection (b)]. As all of the parties involved in this litigation are aware, each of the county retirement systems that are

before this Court have a large number of “pay codes” that have in recent times been included by the respective boards within “compensation earnable”. Many of these have been negotiated and have resulted in settlement agreements. As petitioners point out in their opening brief, there are categories that may or may not be considered “outside normal working hours”, examples being on-call or stand-by pay or the cashing out of meal time.

The clear intent of AB 197 would appear to this Court to be to simply clarify the language that has existed in § 31461 that the compensation calculation is to be based on days “ordinarily worked by persons”. It does not appear from the information that has been provided that in these counties there has been an abuse in this area. Rather, it seems that the employee organizations and either the employers or the retirement boards have negotiated in good faith how various pay codes fit under Ventura and subsequent decisions. AB 197 simply aids the retirement boards in their oversight role as to compliance with existing law. Judicial intervention would appear to only be appropriate on a case by case basis and not by a general and sweeping writ of mandate.

(b) Item “4” for Phase I. It is the preliminary view of this Court that this item [subsection (1)(A) of new subsection (b)] appears to expand the exclusion of “in kind” cash outs beyond that which the Ventura court interpreted § 31461 to allow. In that sense it is new law, at least as to some pay code items that have been considered includable. Again, a case by case analysis may be needed. In any event, further information is needed to determine if any of the prior practices in this area have

created vested contract rights for ‘legacy employees’ with future retirement dates.

The more difficult issue raised by this legislation is the preamble of subsection (1) which indicates that the 3 items listed are examples for the retirement boards to consider in determining whether they have been “paid to enhance a member’s retirement benefit”. Surely this directive to determine the motivation behind any given compensation paid within the final compensation period is a new requirement of the retirement boards. Here, too, further analysis is needed to determine, what contract rights, if any, have vested regarding this change.

(c) Item “5” for Phase I. This item [subsection (1)(B) of new subsection (b)] likewise appears to add new law. As with “in kind” cash outs, the term “one time or ad hoc” payments can cover a variety of situations. As far as this Court can tell no party has indicated the existence of a regular policy from which ‘legacy employees’ can have an expectation that might become a vested right. Accordingly, the Court will await the briefing and argument on that subject to deal with any issues as to a writ of mandate.

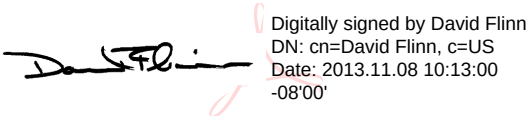
Conclusion

The Court considers this to be a preliminary determination of legal issues solely for the purpose of determining, after further briefing and argument, what contractual rights might exist in favor of the class of persons to which petitioners, or those intervening with similar claims, belong. It is not the intention of the Court that this interim ruling shall have binding effect upon any employee, retiree, retirement board, or government entity funding retirement funds.

The date for oral argument upon the vesting issues in this proceeding is

confirmed as December 10, 2013, at 9:00 a.m. or as soon thereafter as the matter can be heard. At the case management conference scheduled for November 19, 2013, at 9:30 a.m., the Court will set the briefing schedule. The parties interested should, however, commence preparation of their briefing forthwith.

Dated: November 8, 2013



Judge of the Superior Court