

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

ALAMEDA COUNTY DEPUTY SHERIFFS'
ASSOCIATION, et al,

Petitioners,

v.

ALAMEDA COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION; BOARD OF
THE ALAMEDA COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION; et al.,

Respondents.

AND RELATED PETITIONS IN
INTERVENTION

Case No. G12658890
a part of consolidated action MSN12-1870

JUDGMENT

The Honorable David B. Flinn

By this action, Petitioners and Intervenors Alameda County Deputy Sheriffs' Association, Jon Rudolph, James D. Nelson, Darlene Hornsby, Robert Brock, Rocky Medeiros; Service Employees International Union, Local 1021 and Amy Dooha; Alameda County Management Employees' Association; Kurt Von Savoye, International Federation of Professional and Technical Engineers, Local 21; Teamsters Local 856, Hasani Tabari and Daniel Lister; Building Trades Council of Alameda County and Mike Harteau (collectively, "Petitioners and Intervenors") sought a judgment that Assembly Bill 197 (2011-2012 Reg. Sess.) ("AB 197"), and the actions of

Respondents Alameda County Employees' Retirement Association and the Board of Retirement of the Alameda County Employees' Retirement Association (collectively, "ACERA") to implement AB 197, constituted an unconstitutional impairment of vested, contractual rights of active ACERA members hired before January 1, 2013 ("Legacy Members"), represented by Petitioners and Intervenors. Petitioners and Intervenors also sought a Writ of Mandate from this Court, commanding ACERA to continue to calculate Legacy Members' retirement allowances in accordance with ACERA's policies and procedures in place prior to the implementation of AB 197. Petitioners and Intervenors also sought injunctive relief prohibiting ACERA from further implementing AB 197.

Respondent ACERA answered in defense of its Board's actions, and took no position on the constitutionality of AB 197. The State of California intervened to defend the constitutionality of AB 197.

After hearing oral argument from counsel at multiple hearings, and reading and considering the pleadings and the parties' briefs submitted in this matter, the Court has issued its Statement of Decision Upon All Issues Following Hearings of October 31, 2013, December 10, 2013, February 11, 2014, March 7, 2014, and April 25, 2014 ("Statement of Decision"). A true and correct copy of said Statement of Decision is attached hereto as Exhibit A, and is incorporated herein by this reference.

Based upon the Court's findings and conclusion as set forth in the Statement of Decision, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Petitioners' and Intervenors' request that AB 197, and the actions of ACERA to implement AB 197 as to ACERA's Legacy Members, be declared unconstitutional impairments of a vested contractual right to have included in their "compensation earnable" (as defined in Govt. Code § 31461 both prior to and after passage of AB 197) the value of accrued leave cash-outs exceeding the amount that was both earned and payable during their "final compensation" period (as defined in Govt. Code § § 31462 and 31462.1), is DENIED. Even if Legacy Members possessed a contractual

right to have included in their retirement calculations such excess amounts, such rights are unenforceable as a matter of law.

2. No declaration, writ of mandamus, judgment, injunction or other relief shall issue in favor of Petitioners and Intervenors against ACERA as to the issue of leave cash-outs to be included in “compensation earnable” and “final compensation”. ACERA shall implement the provisions of AB 197 that relate to the inclusion of leave cash-outs under Government Code section 31461, subdivisions (b)(2) and (4) in accordance with the terms thereof.

3. Petitioners’ and Intervenors’ request that the provisions of AB 197 that exclude payments for additional services rendered outside normal working hours from “compensation earnable” (Govt. Code § 31461, subd. (b)(3)), and ACERA’s implementation of those provisions, be declared unconstitutional impairments of the vested contractual rights of ACERA Legacy Members is DENIED IN PART and GRANTED IN PART. No declaration, writ of mandamus, judgment, injunction or other relief shall issue in favor of Petitioners and Intervenors against ACERA as to the issue of pay for additional services rendered outside normal working hours to be included in “compensation earnable” and “final compensation,” except to the limited extent stated in Paragraph 4 of this Judgment.

4. The Clerk of this Court shall issue a preemptory writ of mandamus to ACERA, directing ACERA to refrain, as to Legacy Members, from automatically excluding from “compensation earnable” all “on-call,” “standby” or similar pay code compensation, and directing ACERA to make a determination as to each individual member whether: (a) ACERA included such compensation in “compensation earnable” prior to AB 197; and (b) the work was required of the Legacy Member to be served during the “final compensation” period and was ordinarily worked by persons in the same grade or class of positions as the Legacy Member, at the same rate of pay, during that period. If the determination demonstrates to ACERA that the compensation meets all of the foregoing conditions, then ACERA is directed to include such amounts in “compensation earnable.” If the determination demonstrates to ACERA that the compensation does not meet all of the foregoing conditions, then ACERA is directed to exclude such amounts from “compensation

earnable.” Notwithstanding the foregoing, ACERA may exclude any such compensation it determines the member received to enhance his or her retirement benefit, pursuant to Government Code section 31461, subdivision (b)(1).


5. Petitioners’ and Intervenors’ request that the provisions of AB 197 that authorize exclusion from “compensation earnable” of any compensation found by a retirement board to have been paid to enhance a member’s retirement benefit (Govt. Code § 31461, subd. (b)(1)) and ACERA’s implementation of those provisions, be declared unconstitutional impairments of the vested contractual rights of ACERA Legacy Members is DENIED, without prejudice. No declaration, writ of mandamus, judgment, injunction or other relief shall issue in favor of Petitioners and Intervenors against ACERA as to the issue of exclusions under Government Code section 31461, subdivision (b)(1). This denial is without prejudice to the rights of the Petitioners and Intervenors in the future to challenge any such determinations as set forth in Government Code section 31542 and ACERA’s policies and procedures adopted pursuant to Government Code section 31542.

6. The Petitioners’ and Intervenors’ oral request at the March 7, 2014 hearing, to address the issue of whether members whose retirement contributions were calculated based upon actuarial assumptions that included pension benefits that are excluded based on the Court’s decision are entitled to a refund of contributions, is DENIED, without prejudice. None of these issues were before the Court from the pleadings.

7. The Stay Order entered in this action on or about December 13, 2012, shall dissolve on the sixty-first (61st) day following the date of entry of this Judgment. As of the date of entry of this Judgment, the Clerk of this Court shall issue a peremptory writ of mandamus to ACERA, directing ACERA to continue to implement its policies and practices for calculating “compensation earnable” in effect prior to AB 197 for Legacy Members whose effective dates of retirement are within sixty (60) days following the date of entry of this Judgment. On the sixty-first (61st) day following the date of entry of this Judgment, that command shall be of no further force or effect.

8. To the extent Petitioners and Intervenors request any relief which is not expressly addressed in this Judgment, such relief is DENIED.

Dated: May 12, 2014

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The Honorable David B. Flinn
Judge of the Superior Court

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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,

No. N12-1870

vs.

CONTRA COSTA COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION, et al,

Defendants.

FINAL STATEMENT OF
DECISION UPON ALL
ISSUES FOLLOWING
HEARINGS OF
OCTOBER 31, 2013,
DECEMBER 10, 2013,
FEBRUARY 11, 2014,
MARCH 7, 2014, and
APRIL 25, 2014

_____ /

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

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Government Code Section 31461 is a part of the County Employees
Retirement Law of 1937, commonly referred to as "CERL". That section defines
"compensation earnable" which is one of the primary parts of the retirement formula
established by CERL to determine the amount to be paid, as a defined benefit
pension, to employees of counties or other California public agencies, following their
retirements. In 2012 the California Legislature passed, and the governor approved,
AB 197, an amendment to Section 31461 which specified certain compensation

1 categories that are not to be included in the calculation of “compensation earnable”.

2 By its terms the legislation became effective on January 1, 2013. The Petitioners
3 dispute that the Legislature intended these provisions to apply to all retirements after
4 that date.

5 In these consolidated proceedings, petitioners and various interveners (herein,
6 for convenience, collectively referred to as “Petitioners”) seek a determination, by
7 way of Petition for Writ of Mandate, that all employees that were employed prior to
8 January 1, 2013, are free from the restrictions of the amendment because they are
9 “vested” in the right to have their pensions, when they retire, calculated “in the same
10 manner as before AB 197”. Petitioners’ claim is that these existing employees, who
11 they refer to as “legacy employees” (a term which this Court will use herein for
12 convenience), have become vested under doctrines of express contract, implied
13 contract, and/or estoppel.
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16 **Background**

17 CERL came into being in 1937 and the basic concept and primary operating
18 procedures have remained substantially unchanged. While various county or agency
19 plans changed from time to time, and some litigation (discussed below) occurred as
20 to disputes regarding pension calculations under various plans, the rules of the
21 various retirement boards were quite stable.
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23 In 1997 the case of Ventura County Deputy Sheriffs’ Association v. Board of
24 Retirement (1997) 16 Cal.4th 483 came before the California Supreme Court. Justice
25 Baxter, writing for a majority court, described the litigation:
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“Ventura County employees receive retirement benefits (pensions) under a retirement system established pursuant to the County Employees Retirement Law of 1937 (CERL) as codified in 1947. (Gov. Code, § 31450 et seq.) The amount of a pension is based in part on the earnings of the retiree during a selected three-year period or one-year period prior to retirement. In Ventura County the one-year period is used in calculating pensions. We are asked to decide whether various payments by the county over and above the basic salary paid to all employees in the same job classification are "compensation" within the meaning of the statute which defines compensation (§ 31460), and, if so, whether those payments are also "compensation earnable" (§ 31461) and thus part of a retiring employee's "final compensation" (§ 31462 or 31462.1) for purposes of calculating the amount of a pension.”

The Court held that with the exception of overtime pay, certain items of “compensation” paid in cash, ‘over and above the basic salary’, even if not earned by all employees in the same grade or class, had to be included in pension calculations as “compensation earnable” and thus were eligible for inclusion in “final compensation”. Many retirement boards had not been including these types of items of compensation and a large number of negotiations and adjustments took place with the various counties and agencies, some in a litigation posture.

While the Ventura case involved only a limited number of specific items ¹ there existed in the various employment situations that were subject to the Ventura

¹ It appears that these items were bilingual premium pay, uniform maintenance allowances, educational incentive pay, meal period compensation, pay in lieu of annual leave accrual, holiday pay, motorcycle bonuses, field training officer bonuses, longevity incentive payments, and matching deferred compensation payments.

1 decision an almost endless variety of determinations necessary to be made.

2 It has been and remains the practice, it appears, for the employing county or
3 agency to report all compensation or remuneration paid to each employee by using
4 various “pay codes” which the respective retirement boards use in determining
5 whether to include or exclude such items in their determination of “compensation
6 earnable”, i.e. whether it was, or was not, “pensionable”. The task of reviewing the
7 many varied items that might be considered as ‘compensation earnable’ or ‘final
8 compensation’ was extensive and the determinations sometimes close calls.
9 Nonetheless the process continued and it would appear from a review of both the
10 materials involved, and the sparse litigation that has occurred, that there has been
11 little dispute as to whether a given type of compensation item is, or is not, included as
12 ‘compensation earnable’.
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14 A limited number of issues did, however, arise as to the Ventura decision.
15 Several lawsuits were filed to resolve disputes as to whether the decision was
16 “retroactive” and whether assessments to cover the new items could be assessed “in
17 arrears”. Some of those actions also raised issues as to inclusion as ‘compensation
18 earnable’ of “termination pay” and of employee “pick-up” retirement payments. These
19 matters were consolidated before Judge Stuart Pollack of the San Francisco Superior
20 Court and his determinations appealed to the First District Court of Appeal which
21 decided the consolidated actions as reported in In re: Retirement Cases (2003) 110
22 Cal.App.4th 423.
23

24 Actions filed in Alameda and Merced counties, as described below, were each
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1 a part of the consolidated proceedings before Judge Pollack. Each, however,
2 reached a settlement and was remanded back to the applicable local superior court.
3 Those actions, therefore, were not a part of Judge Pollack's decision. A similar action
4 in Contra Costa settled without ever being a part of the consolidated proceedings.
5 The settlements, which will be described below in some detail, varied from each other
6 although each involved agreement as to the types of compensation that should,
7 pursuant to the law set forth in Ventura, have been included, and should in the future
8 be included, in 'compensation earnable'.
9

10 **Procedural Status**

11 The proceedings before the undersigned commenced on November 27, 2012,
12 with the filing of a verified petition for Writ of Mandate filed by Contra Costa County
13 Deputy Sheriffs' Association, United Professional Fire Fighters of Contra Costa
14 County, Local 1230, Ken Westermann and Sean Fawell. Named as respondents
15 were the Contra Costa County Employees' Retirement Association and the Board of
16 Retirement of the Contra Costa County Employees' Retirement Association; they
17 appeared in the action through counsel. The essence of the claim of the original
18 petitioners was that the respondents had determined that they would comply with AB
19 197 for all retirements occurring on or after its effective date of January 1, 2013, and
20 that the Court should mandate that for legacy employees' retirements the legislation
21 should not be considered applicable. When the respondents' counsel advised that
22 the Association and its Board would defend the correctness of its past dealings but
23 would not take a position upon whether the legacy employees had acquired any
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1 “vested” rights or not, the Court directed that notice be given to interested parties.
2 Various parties sought leave to intervene in the action. The Court granted leave to
3 intervene to many parties, including allowing intervention by the Office of the Attorney
4 General that indicated that it would defend the applicability of the legislation as to all
5 retirements.

6 A similar petition was filed (1) by Alameda County Deputy Sheriffs’
7 Association, et al, in Alameda County Superior Court (No. RG12658890), (2) by
8 American Federation of State County and Municipal Employees, Local 2703, et al, in
9 Merced County Superior Court (No. CV003073), and (3) by Marin Association of
10 Public Employees, et al, in Marin County Superior Court (No. CIV1300318). The
11 Attorney General brought a motion before this Court to coordinate the proceedings
12 before the undersigned and a determination was made that all of the criteria for
13 coordination applied. The matters, including the petitions in intervention, were
14 ordered coordinated. 2

17 In case management proceedings the parties were in agreement that
18 significant legal issues are raised by the claims of the petitioners and intervener
19 employee representatives of ‘vesting’ and the position of the Attorney General that
20 one cannot obtain a vested right to something that the law does not allow. The
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24 2 The Court raised the issue as to whether or not this was an action that could only be coordinated by
25 Judicial Council Coordination Proceedings as on its face the issues surely were “complex”. The case
26 was not presumptively complex and the parties all agreed that time was of the essence in these
27 matters proceeding and that the extended time necessary for JCCP motion proceedings would be
28 detrimental. While some parties opposed coordination on the merits, there appeared to be agreement
that the request was properly before the Court as a ‘non-complex’ action.

1 parties agreed to 2 separate sessions of briefing and argument and on October 31
2 the Court issued its decision upon the question of whether the practices of the
3 retirement boards that were before the Court and alleged to be 'vested' were allowed
4 by law. The second session of briefing and argument was then concluded and the
5 Court then issued conclusions of law as to what appear to be the essential legal
6 issues before the Court. Briefing by the parties as to the tentative ruling was solicited
7 by the Court, further oral argument heard on February 11, 2014, and the Court now
8 issues its second (modified) tentative statement of decision.
9

10 In the following analysis the Court has not considered any facts relating to the
11 practices in Marin County. It is the understanding of this Court that before the Marin
12 petition was ordered coordinated here, the assigned Marin County judge had
13 indicated an intent to sustain a demurrer to the petition filed in that action. The
14 petitioners there contested the trial court proceedings by seeking writ relief from the
15 First District Court of Appeal. The writ was denied. It is the view of this Court that the
16 procedural status of that matter is such that the proper action will be to remand that
17 proceeding to the Marin Superior Court without action by this Court.
18

19 **AB197 and Vesting**

20 There can be no serious dispute with the proposition that while certain
21 legislation might be retroactive, persons affected by the legislation might have
22 obtained contrary rights by contract. In Kern v. City of Long Beach, et al (29 Cal.2d
23 848 the California Supreme Court stated:
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25 "Although there may be no right to tenure, public employment gives rise to
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certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of salary earned. Since a pension right is ‘an integral portion of contemplated compensation’ (*Dryden v. Board of Pension Commrs.*, 6 Cal.2d at p. 579 [59 P.2d 104]), it cannot be destroyed, once it has vested, without impairing a contractual obligation.”

The protected rights come from both the Federal Constitution which prohibits any state from passing a law “impairing the obligation of contracts” (U.S. Constitution, Art. I, § 10) and the parallel proscription contained in Article I, section 9 of the California Constitution. Don Allen v. Board of Administration (1983) 34 Cal.3d 114, 119.

It is clearly recognized, however, that there are exceptions to this broad rule. The Kern court went on to discuss various circumstances where the vested right is limited to a “substantial or reasonable” pension and that the terms and conditions of the benefits may be altered.

Over time various restrictions upon any exceptions have been stated in the appellate opinions of the state. It has been repeatedly held that while construction of pension provisions, where ambiguous, must be considered in a manner which will accomplish the objects and purposes of the pension litigation, they shall be “liberally construed in favor of the applicant. Terry v. City of Berkeley (1953) 41 Cal.2d 698. In Manning Allen v. City of Long Beach (1955) 45 Cal.2d 128 the Court stated that any modifications must “bear some material relation to the theory of a pension system” and that changes resulting in a disadvantage to the retiree must “be accompanied by comparable new advantages”. Not all challenges to pension modifications are

1 successful. Thus while the court in Miller v. State of California (1977) 18 Cal.3d 808
2 recited the general rules as to 'vesting' of contract rights, it denied the plaintiff's claim
3 that the employer could not lower mandatory retirement age from 70 to 67, thus
4 lowering the amount that his pension would provide. The Court pointed out that while
5 guaranteed a pension a public employee is not assured of receiving maximum
6 pension benefits.
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8 It becomes clear upon reviewing the entire landscape of California's appellate
9 jurisprudence regarding vesting of pension rights, that the facts and circumstances
10 involved are critical to any determination. Here, the facts that are at the heart of any
11 determination appear to be generally uncontested. For the purpose therefore of
12 determining the rule of law to be applied in considering the issuance of a Writ of
13 Mandate, the Court relies upon the joint stipulation of facts provided by the parties
14 and certain other items of which the Court will take judicial notice. Attached as Exhibit
15 A hereto is a listing of the full depository of documents that the Court has reviewed
16 and considered in reaching its decision.
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18 In this proceeding it also becomes clear that there are distinct differences
19 between the areas of AB 197 that are in dispute. For that reason, the Court will
20 consider three aspects separately: (1) the requirement that compensation is only
21 earnable if 'earned' and 'payable' in the final compensation period, i.e. the "timing"
22 issue, (2) "on call" or "stand-by" time as payment for services inside or outside of
23 normal working hours, and related pay items, and (3) the topic of other payments
24 determined to be for the purpose of enhancement.
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Timing of “earning” and “payment” of compensation

The parties do not dispute that the retirement boards for the counties of Alameda, Contra Costa and Merced have, since sometime after the issuance of the Ventura decision, not only allowed vacation leave time, sick leave time and other comparable pay items, to be “cashed out” either in the final compensation period or at termination but to be accumulated over various years and still be considered in final compensation if paid in the final compensation period or at terination. In some instances such “cash-outs” were considered to be a part of “final compensation” even if the payment was not made until the employee had actually terminated his or her employment. There has been considerable publicity about this practice, which is generally known as “spiking”, and that undoubtedly played some role in the enactment of AB 197.

Existence of Contracts

The Members³ contend that the practice of including accrued leave cash-outs in final compensation so long as it is paid within the final compensation period or at termination has been adopted between the retirement boards, the employers, and the Members by both express and implied contract and thus all those employed on or before January 1, 2013, (i.e. ‘legacy employees’) are vested in the right to have that practice available at the time of their respective retirements. The first issue,

³ For convenience the original petitioners in these three action, and those interveners taking the same position upon ‘vesting’, shall be referred to as “Members”.

1 therefore, is whether or not there exists such a contract. Analysis separately for each
2 county is appropriate.

3 Contra Costa

4 The primary argument made by the Members is that the settlement made in
5 the actions entitled Paulson v. Contra Costa County Employees' Retirement
6 Association and Walden v. Contra Costa County Employees' Retirement Association
7 which was court approved as a class action, are such a contract. A review of that
8 settlement agreement, Exhibit A of the joint stipulation of facts, finds no such
9 agreement. This is not surprising since "timing" of the various items to be considered
10 for inclusion or exclusion in 'compensation earnable' was not a topic that appeared to
11 be either contained in the claims of the petitioners in that litigation (all retired
12 employees) or negotiated. The applicable part of the printed settlement agreement
13 for this purpose is found in paragraph 14 which states that the parties compromise
14 "as set forth in the inclusions and exclusions identified in Exhibit A". That exhibit to
15 the settlement agreement is entitled "IMPLEMENTING THE 'VENTURA DECISION',
16 INCLUDABLE AND EXCLUDIBLE COUNTY PAY ITEMS, FOR SETTLEMENT
17 PURPOSES". It contains five pages of pay code items, each containing an
18 "explanation", usually a description, and a column entitled "included" which contains
19 "yes" or "no" for each pay code. The pay codes applicable to the 'timing' issue are 62,
20 63, 72 and 80. They read as follows:
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<u>Included</u>	<u>Code</u>	<u>Pay Item</u>	<u>Explanation</u>
yes	62	Sale of Vacation	Value of vacation time sold back to county annually

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EXHIBIT A

1	no	63	Vac/PTO Payoff	Lump sum of accumulated, unused vacation paid upon termination, that was NOT earned in the final compensation period. See also Code 80.
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3	no	72	Sickleave Payoff	Payment, if made at all, is made only to members who terminate and take a refund of their account.
4	yes	80	Vac/PTO Payoff	Lump sum of accumulated, unused vacation paid upon termination, that was earned in the final compensation period. See also Code 63.
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7 Members argue that an express contract to include cash-outs of vacation time,
8 or other leave time, whenever ‘earned’, is found in the “yes” answer to code 62.
9 There is nothing in the wording of that phrase, however, which connotes agreement,
10 *one way or the other*, as to vacation time earned outside of the final compensation
11 period. The inclusion of the phrase “sold back to county annually” is perfectly
12 consistent with the fact that many members will have a three year, rather than one
13 year, final period, thus allowing for 3 annual cash-outs to be included. Further, the
14 analysis urged by Members is inconsistent with pay codes 63 and 80. Those codes
15 appear to fully recognize that Government Code § 31461 requires that only vacation
16 accrual ‘earned’ in the final period may be pensionable.
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18 Nor does the Court find in any of the collective bargaining agreements
19 (“MOUs”) any reference to the timing of ‘earning’ of leave to be considered in
20 calculating the part of final compensation that is to be made up of vacation or other
21 leave cash-outs. This, too, is consistent with the historical background that shows
22 that Ventura only dealt with the concept of which types of payments other than salary
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1 are included in 'compensation earnable'. 4

2 In some instances such 'cash-outs' were considered to be a part of
3 "final compensation" even if the payment was not made until after the employee had
4 actually terminated his or her employment. Even if the Court concludes that leave
5 that is 'cashed-out' must be earned in the final compensation period, the issue
6 therefore remains as to whether such compensation must be payable in the final
7 compensation period. Members contend that the Paulson settlement was an express
8 contract that "lump sum of accumulated, unused vacation paid upon termination, that
9 was earned in the final compensation period" (listed as "paycode 80") would be
10 included in "financial compensation". This position appears to be well-taken, leaving
11 the issue as to whether such a practice is allowable under CERL and / or can create
12 a vested right.
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15 Members are not limited, in any event, in establishing their vested rights, to
16 express contracts. In Retired Employees Assn. of Orange County v. County of
17 Orange (2011) 52 Cal.4th 1171 the California Supreme Court was asked to address
18 the following certified question by the Ninth Circuit Court of Appeals:

19 "Whether, as a matter of California law, a California county and its employees
20 can form an implied contract that confers vested rights to health benefits on
21 retired county employees".
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26 4 "Which payments to a county employee other than base pay must be included when determining an
27 employee's final compensation is a question crucial to the proper administration of a CERL pension
28 system, including the ability of the county to anticipate and meet its funding obligation. Ventura County
Deputy Sheriffs' Association v. Board of Retirement, *supra*, 16 Cal.4th 483, 490.

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In a lengthy opinion authored by Justice Baxter the Court discussed in considerable detail numerous earlier California case regarding claims of implied contracts. After a full analysis of the issue, and consideration of the facts of the case that was before the Ninth Circuit Court, the opinion then concluded:

“In response to the Ninth Circuit’s inquiry, we conclude that, under California law, a vested right to health benefits for retired county employees can be implied under certain circumstances from a county ordinance or resolution. Whether those circumstances exist in this case is beyond the scope of the question posed to us by the Ninth Circuit”. (p. 1194)

The California Supreme Court decision in Orange County does, however, provide considerable guidance in determining whether or not the Contra Costa Members have the benefit of an implied contract. One of the first cases to which the Supreme Court referred was its 1969 decision in Youngman v. Nevada Irrigation District (1969) 70 Cal.2d 240. In that case, which came to the Court following a dismissal upon demurrer, an employee alleged that there was an implied promise that salaries would receive a step increase each year based upon “a previously published, announced and effected practice”. The trial court was overruled upon its sustaining of the demurrer, the Supreme Court concluding that since the District was granted the power to make contracts this was intended to apply to “both implied and express contracts since the only significant difference between the two is the evidentiary

1 method by which proof of their existence and terms is established.”

2 The Orange County opinion provides support for the viewpoint that implied
3 contracts can be created in various ways, stating “Even when a written contract
4 exists, ‘evidence derived from experience and practice can now trigger the
5 incorporation of additional, implied terms’” [citing Scott v. Pacific Gas & Electric Co.
6 (1995) 11 Cal.4th 454, 463]. While the cases discussed in Orange County do not
7 relate to interpretation of pension contracts, it is noteworthy that the backdrop
8 discussed by that Court was in fact a pension dispute, whether there could be an
9 implied contract to not change the make-up of the pooling of employees and retirees
10 in the purchasing of pensioners’ health benefits.
11

12 It is interesting to note that based upon the California Supreme Court decision
13 the Ninth Circuit Court remanded the underlying action by the Retirement Association
14 to the District Court for a determination as to whether or not, under the guidelines
15 provided, an implied contract existed. The District Court found no such contract and
16 dismissed the action. The Association appealed. In a written decision issued
17 February 13, 2014, the Ninth Circuit affirmed the District Court decision. Retired
18 Employees Association of Orange County v. County of Orange (9th Cir., 2014) 2014
19 U.S. App. LEXIS 2748.
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22 Acknowledging that the County and its retired employees have a binding
23 express contract for the provision of health insurance after retirement (based upon
24 MOUs expressly approved by the County Board of Supervisors) the February opinion
25 finds no express contract as to ‘pooling’ of health insurance benefits and examines
26

27 EXHIBIT A
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1 the record for evidence of an implied contract. The Appellant retirement association
2 relied upon the 'practice' of the Board of Supervisors in annually approving MOUs
3 that provided for 'pooling' of retired employees insurance with active employees
4 insurance (thus giving a benefit to the retired group as, being older, they had more
5 claims). The Court found this insufficient, stating that "a practice or policy extended
6 over a period of time does not translate into an implied contract right without clear
7 intent to create that right". The Circuit Court found no other evidence of either "a
8 bargained for" agreement or "any definitive intent or commitment on the part of the
9 County". 5

11 The issue of implied contract in pension benefit cases also arose in Joe Requa
12 v. The Regents of the University of California (2012) 213 Cal.App.4th 213. Plaintiffs in
13 that action challenged a change in the provisions of group health insurance coverage
14 that occurred when the Lawrence Livermore National Laboratory moved from
15 management by the University under a DOE contract, to management by a separate
16 consortium with a new management contract. While upholding the sustaining of
17 demurrer upon an "express contract" ground, the Court of Appeal reversed the ruling
18 made on an "implied" contract basis. The primary allegations in support of such a
19 contract related to the publication of benefit brochures and similar publications that
20 the University Retirement Service had provided to Lab employees during its years of
21 operation.
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25 5 After the District Court reached its decision the Ninth Circuit Court issued an opinion reaching a
26 similar result in Sonoma County Association of Retired Employees v. Sonoma County (9th Cir. 2013)
708 F 3d 1109.

1 The issue of “timing” of leave accruals came before the Contra Costa County
2 Employees’ Retirement Board in January 2010. A power point presentation by the
3 Association’s counsel, Exhibit F of the Joint Stipulation, summarizes the practices
4 then in place. The most direct portion of the presentation on the “timing” topic is
5 found at page 10 of the exhibit in a slide entitled “Example #2” which shows the
6 method by which an employee with more than one year’s accrued vacation can cash
7 out, under then current policy, about 3 years accruals (“about ¼ of a year”). In
8 January 2011 the Association published to its employees a “General Member
9 Retirement Benefits Handbook” which is Exhibit Q to the joint submission. While
10 there are some ambiguities in the brochure as to ‘timing’, taken as a whole the
11 brochure suggests that accumulation in order to “spike” the final year of
12 compensation that is used for benefits determination is allowed. Indeed the brochure
13 appears to encourage employees to do so. (“Making the Most of Your Benefit”, pp
14 16-17.) Most significant is page 18 of the brochure that cautions new employees that
15 only vacation that they “sell back” will go into the pension calculation if it is “both
16 earned and cashable” within the final compensation period. Surely this implies to
17 legacy employees that spiking is still an encouraged benefit.
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21 Based upon this material this Court concludes that there is strong evidence of
22 the existence of an implied contract as to inclusion of ‘cash-outs’ of leave time earned
23 outside of the final compensation period when paid in the final period or at
24 termination. For reasons set forth below, however, a deeper analysis of the facts
25 appears unnecessary.
26

27 EXHIBIT A
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Alameda County

1
2 As with Contra Costa County, the Alameda County Members claim of an
3 express contract is based primarily upon the settlement of a legal action brought
4 shortly after the Ventura decision. Alameda County Employees' Retirement
5 Association v. County of Alameda, case No. 797354-7 appears to have been a
6 consolidation of several actions, all of which reached settlement in a single
7 settlement agreement. The agreement provided for, and the Alameda Superior Court
8 approved, a settlement that applied to both retired and active employees. The
9 settlement agreement is attached as "Exhibit 19" to the Declaration of Kathy Foster
10 and as Exhibit B of the Request for Judicial Notice filed August 16, 2013.
11

12 This Court finds no evidence in that settlement agreement of an express
13 agreement between the parties that spiking of pension benefits by selling back
14 multiple years of accrued vacation time can occur. In fact certain provisions of the
15 agreement appear to suggest just the opposite. The settlement agreement recites
16 that on April 8, 1998, at a public meeting, a resolution was passed providing "new
17 definitions" of 'compensation earnable' and 'final compensation', and recites at length
18 the "New Definitions" for each. For 'compensation earnable' an attempt appears to be
19 made to set forth the essence of the Ventura ruling and it would seem to include
20 cash-outs of accrued leave without any discussion of timing. More importantly,
21 however, the new definition of 'final compensation' specifically provides:
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23

24 "...except that vacation leave and/or sick leave paid as a lump sum shall be
25 recognized as final compensation only to the extent that it is earned during the
26

EXHIBIT A

1 final compensation period and, in the case of a three-year final compensation
2 period, shall be the annual average of the leave earned”.

3 Accordingly, the ACERA settlement appears to recognize that spiking, by use of
4 multiple years of leave time, is not allowable.

5 The agreement also fails to specifically discuss leave cash-outs that are only
6 payable after the final compensation period has concluded. The definition of “final
7 compensation” agreed to in the settlement refers to such a pay-out as “paid as a
8 lump sum” but is silent as to the time of payment.

10 By their pleadings and by supplemental briefing the Alameda Petitioners
11 allege that ACERA “told its members that final compensation would include leave
12 cash outs they received upon retirement” and that this would be “without any
13 limitations on how much leave they were entitled to cash out in any given year”.
14 The Court, in determining the legal issues before it, accepts as true that one or
15 more representatives of ACERA made such oral representations.

17 As to written matters, there appears to be no showing that any information
18 was published that is contrary to the clear limitation contained in the settlement
19 agreement. To the contrary, the newsletter from the Fall of Winter of 2010, attached
20 to the Declaration of Rudy Gonzalez, would further appear to bar any implied
21 agreement to allow spiking by use of multiple years of leave, stating at page 2:
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1 **“Limitations.**

2 When ACERA is calculating your salary for use in the retirement formula, the maximum
3 amount of vacation compensation that can be included in your Final Average Salary is the
4 amount of vacation you earned during your Final Compensation Period. For Tier I and Tier III,
5 that’s one year’s worth of vacation. For Tier II, that’s three years’ worth of vacation. Anything
6 over that maximum you are still compensated for by your employer, but it doesn’t increase your
7 Final Average Salary.”

8 The Court recognizes that this paragraph can be interpreted to provide that even if
9 the employee takes some vacation in the final compensation period, he or she can
10 cash-out a full year’s worth of vacation in that final year. As the parties appear to be
11 in agreement that the employee is entitled to chose which vacation he or she is
12 using, i.e. apply a ‘first in first out’ (FIFO) method, this result is, even under AB 197,
13 allowable ⁶ .

14 The limitations description in the newsletter recognizes an important point in
15 its last sentence. Any restrictions of CERL have no application to the rights that the
16 employing county or agency might provide to the employees, or their contract rights
17 to a vested claim to such rights, to receive such compensation. A review of the MOU
18 with Teamsters Local 856, attached to the Gonzalez Declaration as “Exhibit A”, is a
19 prime example. There are significant provisions as to “vacation payoff” but none
20 attempt to deal with the inclusion or exclusion of such payoffs in ‘compensation
21 earnable’ or ‘final compensation’.

22 The Court finds no evidence as to Alameda County which establishes that an
23 implied contract to allow multiple years of vacation accrual to be added to, and thus

24 _____
25 ⁶ Using “FIFO” an employee allowed 168 hours leave per year that had carried over 100 hours and
26 then took 150 hours of vacation in that second year can elect to have taken the 100 hours of carried
27 time and only 50 hours of the newly earned time so that cashing out the 118 hours available would the
28 cashing out of time all earned in the year of the cash out.

1 spike, 'final compensation'.

2 The Alameda members also appear to contend that an implied agreement
3 exists, based upon practice, that leave earned in the final compensation period but
4 not paid until after employment has terminated, will be included by the retirement
5 board in the calculation of 'final compensation'. The evidence on this point appears,
6 however, to be rather ambiguous. While it appears that ACERA has been allowing
7 certain leave to be cashed out "at termination" it is uncertain as to whether this
8 allowance calls for a request for cash-out as the final compensation comes to an end,
9 or has allowed cash-outs to be paid as termination pay.

11 Merced County

12 The situation in Merced County is more complex. It appears that there exist as
13 to Merced employees three separate pay codes, No. 393 is labeled "annual vacation
14 sell-back" and No. 350 is labeled "vacation payoff, first 160 hours only". Pay code
15 354 is labeled "Sick Leave Sell-back". Pay code 350 was apparently created after a
16 post-Ventura settlement that provided that the retirement association would
17

18 "include within compensation earnable amounts pertaining to members
19 accrued vacation and holiday leave in their final compensation period ...a
20 maximum of 160 hours of annual leave, a maximum of one year's annual
21 leave accrual, or the number of annual leave hours actually included in the
22 Member's vacation payoff, whichever is less."
23

24
25 For some 6 years the association included both pay codes 350 and 393 in the
26

1 calculation of 'compensation earnable' but then concluded that this was a clerical
2 error and brought an action against the 19 retirees who had received pension
3 payments based upon this calculation. The association argued that the subject
4 provision of the settlement agreement (set forth above), although ambiguous,
5 provided that the total maximum allowable would be 160 hours. As the retirees each
6 had received 160 hours in pay code 350, and between 40 and 80 hours during their
7 final year for vacation sell-back, they disputed this position. Limiting itself to the task
8 of interpreting the settlement agreement, and concluding that it was ambiguous, the
9 Merced Court determined that it had been intended by the settlement that the retiree
10 be granted the right to have both the final year sell-back and the termination date
11 sell-back included in the calculation of 'compensation earnable'. As a decision
12 between the association and 19 private litigants, the decision cannot be deemed to
13 be an express contract between either the association or the employers as to current
14 employees of the association. The rights of continuing employees, however, stem
15 from the settlement agreement that was at issue in the litigation and it can be credibly
16 arguable that the Court decision creates at least an implied agreement in that both
17 employer and employee certainly knew of it.

21 Following the enactment of AB 197 the Merced CERA board determined that
22 pay codes 354 (sick leave pay-back) and 393 (annual vacation sell-pack) would
23 remain included in 'earned compensation' but that paycode 350 (vacation payoff, first
24 160 hours) would be excluded. On January 27, 2014, the parties to the Merced action
25 entered into and filed two stipulations with the Court. In those stipulations the parties

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1 agree that pay codes 354 and 393 are properly included because the compensation
2 provided “may be earned” and is “payable” within the final compensation period (and
3 therefore is not ‘termination pay’). The Merced petitioners appear to agree that pay
4 code 350 is ‘termination pay’ but contend that the judgment in the earlier Merced
5 litigation creates at least an implied contract for inclusion.
6

7 Legality of any Implied Contracts

8 A separate analysis is appropriate for the issue of whether or not these
9 retirement board practices, prior to AB 197, were allowable under CERL.

10 **a. “earned” compensation.**

11 The Attorney General argues that any express or implied contracts found to
12 have been created between the retirement associations and its members prior to AB
13 197 cannot become “vested” if they were unlawful. As to the “timing” issue of spiking
14 the first question then is whether AB 1997 changed the law or whether the law
15 always required that only leave time earned in the final compensation period could be
16 included as ‘compensation earnable’. The Court resolved this issue upon earlier
17 briefing and oral argument. As defined at that time the issue was “whether or not
18 some of the practices being followed by the respondent boards in determining
19 “compensation earnable” and “final compensation”, as defined in Government Code
20 §§ 31461 and 31462, were unauthorized by law prior to the enactment of AB 197”.

23 Section 31461, prior to AB 197, read as follows:

24 “ ‘Compensation earnable’ by a member means the average
25 compensation as determined by the board, for the period under
26 consideration upon the basis of the average number of days ordinarily
27 worked by persons in the same grade or class of positions during the

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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 retirement 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. 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 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

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1 both the full statute and its last sentence is to prevent the “spiking” that is here at
2 issue. As discussed below, we know from the Supreme Court decision in Ventura
3 County Deputy Sheriffs’ Association vs. Board of Retirement, *supra*, 16 Cal.4th 483,
4 505, that the cash-out of leave time is both “compensation” and “compensation
5 earnable”. It is clear from the language of § 31461 when it is earnable as well, for the
6 statute refers to compensation for an “absence” to be based upon the compensation
7 at the beginning of the absence. In other words, the right to “time that is paid without
8 work” is compensation. Webster’s Dictionary defines “earn” as “to merit or deserve,
9 as by labor or service”. Ventura tells us that it is by this earning of the right to be paid
10 without work that we must include the cash-out as “compensation”. Accordingly, the
11 employee has “compensation” when he is granted the right to take time off and still
12 be paid and therefore that is when it is “earned”. The last sentence of § 31461 tells
13 us that it is “earnable” at the time when the employee incurs the right, not at the time
14 of the cash-out. Compensation can only be “earnable” at one time; it cannot become
15 “earnable” again and again.

18 This ordinary meaning of the final sentence of § 31461 is consistent with the
19 usual and normal expectations of our society regarding employee pensions. As
20 employees age our populous recognizes the need for that person to continue with a
21 standard of living at or reasonably close to that while working but recognizes that it is
22 no longer necessary for the retiree to be building a healthy nest. And yet if this Court
23 were to adopt the position of the petitioners that the Legislature intended that
24 pensions could be adjusted upward by compiling leave time accumulated and
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1 including it as the average compensation in his or her “final compensation”
2 computation period, the possibility of a pension greater than what the employee was
3 regularly earning would result. This Court finds no evidence that the Legislature had
4 such an intention. At least one appellate court has addressed the deviation from
5 statutory intent that such distortion would allow. Hudson v. Board of Administration of
6 the Public Employees’ Retirement System (1997) 59 Cal.app.4th 1310, 1321-3.
7

8 Even were § 31461 ambiguous, little if any support can be found for the
9 petitioners’ proposition that the final sentence of § 31461 was intended by the
10 Legislature solely for only a narrowly defined purpose. The proposal of petitioners
11 that “compensation that has been deferred” was intended to only refer to monies put
12 aside in a tax saving plan, such as a 401K plan, is found in In re Retirement Cases
13 (2003) 110 Cal.App.4th 426, 475, based upon a comment by Judge Pollak that “on its
14 face” the sentence might apply to payments made to a deferred compensation plan.
15 Both Judge Pollak and the Court of Appeal, however, disregarded that comment by
16 finding that for the issue before that court § 31461 has no application. It is the view of
17 this Court that such *dicta* misses the main point; the words of the Legislature are to
18 be given their ordinary meaning. The ‘deferred compensation plan’ theory fails, in the
19 view of this Court, because under no set of tax laws that exists today, or has existed
20 in the relevant time, was an employee allowed to deduct from his or her taxable
21 income an amount of compensation placed into a tax-deferred compensation plan
22 that was earned in a different year than the year of the tax return. Thus, the existence
23 of the possibility referred to by petitioners that the Legislature intended only to refer
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1 to this type of “deferred compensation” is not feasible.

2 More importantly, the determination of when compensation is “earnable”, as
3 applied to accrued leave time, does not depend upon the wording of that final
4 sentence. Standing alone the other provisions of the section do not lead to the
5 conclusion that the Legislature intended that employees could save up all of their
6 leave time and add the value of that total in determining their ‘average’ compensation
7 during the final compensation period.
8

9 Were the Court to determine that the statute contained an ambiguity that must
10 be interpreted, it would, in any event look to legislative history of the section itself,
11 legislative history of all of CERL, case law that has addressed the issue, comparative
12 legislation, and any other factors that the Legislature might have been considering
13 when the legislation was drafted. None of these support the interpretation proposed
14 by petitioners.
15

16 In Ventura County Deputy Sheriffs’ Association vs. Board of Retirement,
17 *supra*, 16 Cal.4th 483, the California Supreme Court issued what is considered a
18 landmark decision in the area of county government pensions. In overruling at least
19 one Court of Appeal decision ⁷ the Court held that bonuses, incentives, and other
20 forms of compensation, even if not received by all employees in a job classification,
21 were “compensation earnable”. There can be no dispute that following the issuance
22 of that opinion a great number of retirement boards were challenged for having
23 followed the Guelfi narrow definition of “compensation earnable” resulting in a
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26 ⁷ Guelfi v. Marin County Employees’ Retirement Association (1983) 145 Cal.App.3d 297.

1 number of renegotiations, modifications, settlement, and sometimes litigation.

2 What is clear, however, is that in no manner did the Ventura court address the
3 issue of timing that is before this Court today. Indeed, there is no suggestion in any
4 part of the opinion that the items in Ventura County that had been held out of the
5 determination of “compensation earnable” were earned by any challenging employee
6 at any time other than within the period for which “final compensation” was
7 calculated.
8

9 Petitioners erroneously suggest that the Ventura opinion recognized the
10 position that they are taking which allows accumulation of earned leave to be cashed
11 out in the final compensation period and therefore included in “final compensation”.
12 They refer specifically to footnotes 6 and 11 of the opinion. Those footnotes,
13 however, simply advise the reader as to what the practices of Ventura County were
14 as to compensating the employee, not calculation of “final compensation”.
15

16 It needs to be understood that the issue of whether the counties or involved
17 agencies can, by their collective bargaining agreements, agree to allow a multi-year
18 calculation of accrued leave to be cashed out all in one year, is not before this Court.
19 Indeed, there has been no suggestion that such practices are improper. The only
20 issue here before the Court is whether or not the law allows that entire cash-out
21 payment to be “spiked” into the employee’s lifetime retirement payment.
22

23 The Ventura court declined to consider whether its decision should have
24 retroactive application. The issue of retroactivity was the topic of a number of actions
25 filed as to the 20 retirement boards operating under CERL and those cases were
26

1 consolidated, pursuant to CCP § 404, before Hon. Stuart Pollack of the San
2 Francisco Superior Court. His decisions were appealed (by both sides) resulting in
3 the substantial decision issued by the First District Court of Appeal entitled In re
4 Retirement Cases (2003) 110 Cal.App.4th 426 which held that Ventura was to be
5 applied retroactively.

6
7 In re Retirement Cases also addressed the issue of whether accrued leave
8 should be included in retirement calculations. The issue before it, however, was quite
9 the opposite from that before us here. The petitioning employees in those
10 proceedings had not cashed out their accrued leave in their final compensation
11 period, but rather had taken it as “termination” pay. Without having to determine
12 when the right was earned or earnable, the Court merely interpreted the statute
13 which it found quite clearly prohibited such pay from being included in “final
14 compensation”.

15
16 In Salus v. San Diego County Employees Retirement Association (2004) 117
17 Cal.App.4th 734, petitioning employees sought to obtain a different result for sick
18 leave cash-outs that they were granted as incentive to remain employed during a
19 transition which would eliminate their positions. The Court rejected their position
20 stating “such one-time post-termination payments cannot be considered part of final
21 compensation without creating the risk of substantial distortion in the retirement
22 benefits otherwise payable to employees”. Salus at p.741. In a realistic sense,
23 granting the employee the right to manipulate his or her pension by cashing out leave
24 time earned over a longer time than the final compensation period would result in the
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1 same distortion. 8

2 Petitioners rely upon the decision in Guelfi v. Marin County Employees'
3 Retirement Association (1983) 145 Cal.App.3d 297. Like Ventura and In re
4 Retirement Cases the Guelfi court was not called upon to determine any timing issue
5 and did not address it. While the facts before that case indicated a dispute as to
6 whether or not the retirement board was *required* to include certain items as
7 compensation, there is no reason to draw an inference, one way or the other, as to
8 whether the Guelfi court believed that CERL allows a retirement board to include as
9 "compensation earnable" items not intended to be allowed by the legislation.
10

11 This Court rejects the proposal of petitioners that the wording of the definition
12 of "compensation earnable" as "the average compensation as determined by the
13 board..." was intended by the Legislature to give each board carte blanche authority
14 to add whatever items it wished to the calculation. By ordinary meaning the
15 Legislature simply directed each board to make the mathematical or related
16 determination of 'average' compensation. No appellate court has based a decision as
17 to the calculation of "compensation earnable" upon a contrary conclusion.
18

19 The position of the petitioners on this point is troublesome; they seem to be of
20 the view that retirement boards are highly restricted unless making a determination
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24 _____
25 8 The Salus court made reference to the comparison of CERL provisions to PERS requirements. Both
26 sides address that issue here but it is not relevant in that there is no need in analyzing PERS to
27 determine when leave is includable because under the applicable provisions state employees cannot
28 include any unused leave in the calculation of their final compensation.

1 that favors the employee. Indeed, in Guelfi the appellant retirees urged the
2 appellate court that boards were not entitled to “determine which elements of
3 compensation are to be included or excluded” and that the board could only make a
4 “rudimentary calculation” (Guelfi at p.304). Likewise in Ventura the employees urged
5 that the Board could not determine that the questioned items were not “compensation
6 earnable” as such was beyond its discretion. Even with recognizing that the pension
7 laws are to be liberally construed in favor of employees (Ventura at p.490), the
8 employee side of these actions cannot have it both ways.
9

10 In County of Marin Association of Firefighters v. Marin County Employees’
11 Retirement Association (1994) 30 Cal.App.4th 1638, the retirement board sought to
12 rely upon the Guelfi statement that it had the authority to determine whether or not
13 holiday pay not included for a number of years should be included retroactively. The
14 Association of Firefighters was successful in denying that interpretation and the
15 court ultimately held that retirement boards do not have the “discretion” to determine
16 whether an element is a part of “compensation earnable”. As that Court indicated, if
17 such were the rule it would have been unnecessary for the Guelfi court to determine
18 which items met the definition (Marin at p. 1646).
19
20

21 The decision in Oden v. Board of Administration (1994) 23 Cal.App.4th 194 is
22 significant in this regard. At issue were certain varying policies of the PERS board in
23 including in or excluding from pension calculations pension contributions by the
24 employer (“pick-ups”) that were by collective bargaining MOUs agreed to be “as if”
25 paid by the employer. What is significant for our determination here is the Appellate
26

1 Court's determination of who is empowered to interpret the statutes:

2 "The Board's distinction among employer-paid member contributions
3 rests entirely upon the characterization elected in bargaining
4 agreements and is untenable because public agencies are not free to
5 define their employee contributions as compensation or not
6 compensation under PERL---the Legislature makes those
7 determinations. Statutory definitions delineating the scope of PERS
8 compensation cannot be qualified by bargaining agreements. (*Service
9 Employees International Union v. Sacramento Unified School District
10 (1984) 151 Cal.App.3d 705, 709-710.*)"

11 The Oden court went on to interpret the relevant statute (overruling the trial court
12 interpretation) using the traditional rules of statutory interpretation. Indeed, that is
13 what the courts did in both Ventura and In re Retirement Cases.

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

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

26 Though the phrase "deferred compensation" is used in those legislative

1 digests, there is nothing in the plain language of the statute or the legislative history
2 to support the conclusion that the phrase “compensation that has been deferred”
3 refers only to items commonly referred to as deferred compensation. Indeed, the
4 Governor’s Bill Report relating to SB 226, which was the basis for the 1996
5 amendment to CERL, notes that the purpose of that last sentence of Section 31461
6 was “ to prevent employers from purposely delaying payment of certain benefits until
7 the final year of employment in an effort to increase the dollar amount of employees
8 (sic) final compensation.” (State’s RJN Exh. 14, p. 3; See also State’s RJN Exh. 15,
9 p. 2.) This summary suggests that the “deferred” compensation items are not just
10 tax-deferred compensation but also any pay item that an employer can purposely
11 delay paying until the final year of employment.

12
13 The legislative comments to AB 197 further support the conclusion that this sentence
14 added to Section 31461 and made applicable to all counties in 1996 was intended to
15 limit compensation earnable to that which was earned and payable in the final year.
16 AB 197 was introduced after AB 340 (PEPRA) to clarify that the intent of PEPRA was
17 to make changes that were consistent with existing law. (See State’s RJN Exhs. 9,
18 11, 12.) Specifically, the commentary states that the changes are consistent with
19 case law existing since 2003, which limited the definition of “compensation earnable”
20 to compensation that was “earned in a year.” (State’s RJN Exh. 9, p. 2)
21

22
23 Finally, while it is not binding upon petitioners in the determination of this
24 issue, it is significant that both in 1997 and in 2009 counsel for the Contra Costa
25 County Retirement Board specifically opined to their said client that leave time not
26

1 earned in the final compensation period could not be included. Morrison & Foerster
2 opinion letter of November 24, 1997 [Exhibit D of the First Amended Joint Statement
3 of Stipulated Facts] and Reed Smith opinion letter of October 21, 2009 [Exhibit E of
4 the First Amended Joint Statement of Stipulated Facts].

5 **b. Earned and “Payable”.**

6
7 The members also contend that this Court should require the respective
8 retirement boards to include within the determination of ‘final compensation’
9 payments which ‘cash-out’ leave, particularly that earned in the final compensation
10 period, even if not received until termination. In both In re Retirement Cases, *supra*,
11 110 Cal.App.4th 426, 475 and Salus v. San Diego County Employees Retirement
12 Association, *supra*, 117 Cal.App.4th 734 the courts unequivocally held that
13 “termination pay” may not be included. In both cases, however, the pay items being
14 challenged were clearly “one time” payments that were based upon termination. The
15 trial court in In re Retirement Cases specifically referred to the leave ‘cash-out-
16 payments “that only occur ‘upon separation’ and in Salus the sick leave cash-outs
17 were clearly designated as “post-retirement payments”.

18
19 The holdings of these opinions were not only clear and unambiguous, but
20 were the subject of discussion at proceedings of the respective retirement boards.
21 For instance, at a meeting of the Board of Retirement for Contra Costa County on
22 March 10, 2010 (Exhibit L to the Joint Stipulation of Facts) counsel reminded the
23 Board that pay items that are “only payable after termination” may not be included in
24 “final compensation”. Counsel also clarified the respective roles:
25
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1 "employers and employees determine what items of compensation are to be
2 received during service; the retirement board determines which of those items
3 should be counted in calculating retirement allowances".

4 AB 197 incorporates this prior law as section 31461 (b) (4) excludes "payments made
5 at the termination of employment, except those payments that do not exceed what is
6 earned and payable in each 12-month period during the final average salary period,
7 regardless of when reported or paid" (emphasis added). A clear distinction was
8 therefore drawn between "payable" and "paid". Accordingly, an employer and
9 employee may agree generally (but not for a purpose of 'enhancement') that vacation
10 not used may only be cashed out as the employee winds up and prepares to
11 terminate the employment, but that the employee has the option of taking the funds
12 during or after the final compensation year. Such a situation is not "termination pay".
13 The law has been and remains, however, that to be included in 'final compensation'
14 the cash-out of accumulated leave must have been payable in the final period, i.e.
15 the employee had to have the right to "sell" (i.e. create the monetary obligation for
16 "cash out") the accumulated leave prior to the end of his or her employment.
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19 **c. Invalid Contracts.**
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21 The Court concludes that the Attorney General's analysis of the issue as to
22 whether an employee can be vested in the promises contained in a contract that is
23 invalid is correct. In Medina v. Board of Retirement (2003) 112 Cal.App.4th 864 the
24 court stated:

25 "The contract clause does not protect expectations that are based upon
26

1 contracts that are invalid, illegal, unenforceable, or which arise without the
2 giving of consideration” [citations].

3 In Medina Deputy District Attorneys who had been “safety officers”, who are entitled
4 to better retirement benefits, had relied upon benefits statements and other evidence
5 which had them continued to be designated as “safety officers” for many years
6 although by statute they were not “safety officers”. The facts were not disputed. It
7 was held, however, that the contract clause does not apply since they could not
8 legally be given “safety officer” status.

10 One did not have to wait until Medina to be advised that illegal contracts
11 cannot create vested rights. In the California Supreme Court in Youngman V Nevada
12 Irrigation District, supra, 70 Cal.2d 240, it was stated “Governmental subdivisions
13 may be bound by an implied contract if there is no statutory prohibition against such
14 arrangements”.

16 This rule of law is repeated in Retired Employees Assn. of Orange County v.
17 County of Orange, supra, 52 Cal.4th 1171, 1176, as the Supreme Court repeats that
18 an implied contract can create vested rights “if there is no legislative prohibition
19 against such arrangements, such as a statute or ordinance”.

21 Equally important to this issue is the basic precept that has been set forth
22 through the many years of government employee pension litigation; the Court must
23 always look to the overall purpose of the pension litigation. Appellate courts have
24 often referred to the need to allow modifications to the pension system if needed to
25 “maintain the integrity of the system and carry out its beneficent policy”. Kern v. City
26

1 of Long Beach, et al , *supra*, 29 Cal.2d 848, 854-5. See also Manning Allen v. City of
2 Long Beach, *supra*, 45 Cal.2d 128, 131. The legislation at issue, the provision of
3 Section 31461 which bars from ‘compensation earnable’ earnings that were not
4 actually earned in the final compensation term, certainly is an important part of
5 maintaining the integrity, and fairness to both employees and the public, of CERL
6 pension systems. Likewise, one-time payments for unused leave time, where limited
7 to being “termination pay”, do not logically correlate to “average” compensation in the
8 final year or years.

9
10 In contrast to the foregoing, the Members provide no case or statutory
11 authority that reaches a contrary conclusion. The Court therefore concludes that any
12 express or implied contract to maintain the allowance of spiking pensions by bringing
13 forward more accrued leave than can be earned in the final compensation period, or
14 to include “termination pay” in ‘final compensation’, is unenforceable.

15 16 Equitable Estoppel

17 While the concept of vesting due to an enforceable actual contract and the
18 concept of equitable estoppel are in some manners closely related, there are
19 differences. For one thing, contracts are traditionally enforced by a court of law and
20 estoppel is evoked by a court acting in equity. While the court acting in law is simply
21 looking to determine that the elements necessary to create a contract are in
22 existence, the equity court is looking for a fair balancing of the respective rights of the
23 parties involved.
24

25 The elements for equitable estoppel are set forth in Crumpler v. Board of
26

1 Administration, Public Employees Retirement System, et al (1973) 32 Cal.App.3d

2 567, 581:

3 “(1) the party to be estopped must be apprised of the facts; (2) he must intend
4 that his conduct shall be acted upon, or must so act that the party asserting
5 the estoppel had a right to believe it was so intended; (3) the other party must
6 be ignorant of the true state of facts, and (4) he must rely upon the conduct to
7 his injury”.

8 [citing Driscoll v. City of Los Angeles () 67 Cal.2d 297, 305]

9
10 In the context of the issues before this Court the issue is not as simple as simply
11 reviewing the existence of these factors. Also involved are issues of (1) whether the
12 retirement boards can bind the government entities and taxpayers that foot the bill for
13 the boards promises, and (2) whether the absence of legal authority to take the
14 action under discussion makes the doctrine of estoppel unavailable.
15

16 At least in some circumstances it appears to be rather without doubt that there
17 are existing one or more legacy employees who can establish each of the four
18 elements required as to inclusion of vacation or other leave time accumulated over a
19 period longer than the final compensation period. The respective retirement boards
20 unquestionably knew that they were allowing a larger amount of ‘compensation
21 earnable’ than either AB 197 now allows or this Court has determined the prior
22 version of Section 31461 to have allowed. Their publication and/or acknowledgement
23 appear clearly intended to have the Members act upon their advice.
24

25 While one can postulate that everyone is presumed to know “the law”, in
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1 reality the pension laws are at such a level of complexity that Members would not
2 know, when advised by the boards to the contrary, that monies received in their final
3 compensation period were not includable in their pension calculations because the
4 leave time accrued in an earlier period.

5 The facts in Crumpler assist in this analysis. Like the employees here, certain
6 animal control officers were given erroneous advice; in that case advice that they
7 qualified as “safety officers”. The court held that it was unequivocally clear that the
8 city intended its advice to be relied upon, that the employees had a right to believe
9 the city so intended, and that the employees were ignorant of the fact that the advice
10 was erroneous. (The court also held that the estoppel applied even though the advice
11 was given in ‘good faith’; a fact that also appears to apply in this case.)
12

13 It can be argued as to the final element of estoppel that employees that “bank”
14 vacation or other leave are not injured because they are paid for such conduct even if
15 the payment is not pensionable. A sensible analysis, however, shows otherwise. In
16 reality there is a major difference to an employee in taking vacation time (there is
17 seldom enough—compare European vacation practices) and simply working and
18 receiving the normal daily rate of pay for each vacation day not taken. Picture the
19 family that wishes the wage earner to take them along with family friends to a “terrific
20 week” but is turned down by the wage earner who is of the belief that with retirement
21 on the horizon he should not deprive himself and his family of the value of the
22 increased pension benefit. This Court concludes that the injury is the difference
23 between the value of giving up actual vacation without any ‘extra’ value for doing so
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1 and the value of receiving that value in the employee's pension years.

2 Crumpler provides further logic for a finding of injury, pointing out that the
3 animal control officers relied by 'relinquishing other employment'. Here, that can be
4 inferred to apply as well.

5 It is the view of the Court, however, that 'injury' generally applies only to those
6 persons who did, prior to the enactment of AB 197, accumulate vacation that could
7 have been taken and was beyond the amount that, when cashed out, will be in
8 excess of the amount which, using a FIFO calculation, will be allowable as
9 'compensation earnable' for that year. Reliance by other persons is far too
10 speculative to qualify as 'injury' under the estoppel doctrine.
11

12 Turning to the fact that it was the retirement boards rather than the
13 government employers that provided the erroneous information, one finds that this
14 issue has also been determined in Crumpler v. Board of Administration, Public
15 Employees Retirement System, et al, supra, 32 Cal.App.3d 567, 582-3. In a situation
16 the reverse of that here before us the retirement board urged that the bad advice of
17 the city could not be imputed to it. The Court stated that "An estoppel binds not only
18 the immediate parties to the transaction but those in privity with them, and that "A
19 public agency may not avoid estoppel by privity on the ground that the conduct giving
20 rise to estoppel was committed by an independent public entity". See Lerner v. Los
21 Angeles City Board of Education (1963) 59 Cal.2d 382, 398-9.
22
23

24 The issue of whether the absence of legal authority to take the action under
25 discussion makes the doctrine of estoppel unavailable requires considerable
26

1 analysis. As indicated above this Court has determined that CERL, in the existing
2 version of Section 31461, barred pension spiking by inclusion of leave time accrued
3 from time other than that of the final compensation period. For this issue we can look
4 to the analysis provided by the California Supreme Court in City of Long Beach v.
5 Mansell (1970) 3 Cal.3d 462 where the issue was directly addressed. Firstly the
6 Court reminded of the underlying basis of equitable estoppel, quoting from numerous
7 historic writings on the topic which use descriptions such as “conscience and fair
8 dealing” (Lord Denman), “foundation in justice and good conscience” and “motives of
9 equity and fair dealing” (Professor Pomeroy). The Court then stated that “the proper
10 rule governing equitable estoppel against the government is the following: The
11 government may be bound by an equitable estoppel in the same manner as a private
12 party when the elements requisite to such an estoppel against a private party are
13 present and, in the considered view of a court of equity, the injustice which would
14 result from a failure to uphold an estoppel is of sufficient dimension to justify any
15 effect upon public interest or policy which would result from the raising of an
16 estoppel”.

17
18
19 In response to the claim that the court should not allow to occur by estoppel
20 that which the law otherwise forbids, the Supreme Court indicated that to strictly
21 apply such a rule would frustrate the public policy contained in the doctrine of
22 estoppel and that its balancing rule, as above described, is the better approach.

23
24 The decision in Longshore v. County of Ventura (1979) 25 Cal.3d 14, relied
25 upon by the Attorney General, is not in opposition to the Mansell approach. The
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1 Court there appears to follow the balancing methodology but simply comes to an
2 opposite result, concluding that the estoppel would be contrary to “clear constitutional
3 policy”. For a more relevant analysis of equitable estoppel principles see City of
4 Oakland v. Oakland Police and Fire Retirement System (Opinion issued February 28,
5 2014, First District Court of Appeal case A136769, reported at 2014 Cal.App.Lexis
6 192).

7
8 Applied to the instant facts it is important to be aware that we are evaluating
9 the respective positions of the employees and the retirement board in the context of
10 pensions, a category that has long received favorable treatment in our laws. Estoppel
11 has often been applied. See West v. Hunt Foods, Inc. (1951) 101 Cal.App.2d 597,
12 604-5. We have, in its simplest terms, the question of to what degree an employee of
13 government whose pension is governed by CERL may rely upon the advice of the
14 retirement board in making his or her employment decisions. To conclude that such
15 person is required to seek independent legal advice to safely make those decisions
16 appears to this Court to be illogical.

17
18 Some oppositions suggest that the cost to the taxpayers of allowing legacy
19 employees to have the benefit of their expectations as to the vacation that they
20 accrued by non-use before AB 197 might be catastrophic but the Court sees no
21 evidence of that. To the contrary, there are two counterbalancing factors. Firstly, it
22 appears that generally the employers have placed limitations upon the amount of
23 leave that may be “cashed out”. Secondly, the number of employees that have
24 accumulated and are holding for retirement more vacation than can now be cashed
25

1 out in one year (or three in the case of three-year final period employees) seems
2 unlikely to be large. These employees have been on notice since the passage of AB
3 197 of the restrictions and presumably will take rather than save vacation that would
4 under applicable rules not be includable in 'compensation earnable'.

5 A significant factor in the analysis is that any cost for this past 'spiking' has
6 been actuarially accounted for. The retirement boards assure that where they have
7 determined, by stipulation, litigation or otherwise, to include an item in 'compensation
8 earnable' estimates of the amounts needed to be input into the retirement funds have
9 been made and enforced. Thus, the effect upon public interest or policy, which the
10 Mansell court instructs us to consider, does not appear substantial.

11 The circumstances in each of the three counties differ. In both Contra Costa
12 County and Merced County, the circumstances for finding an implied contract with
13 the retirement board, as described above, existed. Contra Costa published
14 information that clearly suggested that leave did not have to be "earned" in the final
15 compensation period and appear to have given Contra Costa members no contrary
16 information. In Merced court litigation clearly suggested to those members that the
17 same result could accrue. As indicated above, the Court concludes that in Alameda
18 County ACERA published materials that correctly defined the limitation that only
19 compensation 'earned' in the final period could be included. Applying the balancing
20 requirements of Mansell this Court concludes that the doctrine of estoppel cannot be
21 applied to Alameda members.

22 Accordingly, a Writ of Mandate regarding this subject is appropriate but only

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1 applicable as to the single class of legacy employees entitled to apply the doctrine of
2 equitable estoppel by being injured in the manner described. Specifically, the doctrine
3 of equitable estoppel will not apply to members that merely had the expectation of
4 carrying vacation or other leave time forward and cashing it out in their final
5 compensation period. Only those Contra Costa and Merced Members who meet the
6 following requirements are entitled to the benefit of a Writ of Mandate as to
7 “earnable” and “payable” requirements on the basis of equitable estoppel:
8

- 9 a. Prior to AB 197 the applicable employer allowed, during employment, a
10 cash out of unused leave time in amounts in excess of the amount of leave
11 time earned in the selected final period;
12
13 b. As of December 31, 2012, the employee had accrued and not used one
14 or more types of such leave time in an amount or amounts in excess of
15 that allowed for one year (or 3 years if the employee position uses an
16 averaged 3 year final compensation period);
17
18 c. The employee had not used or cashed-out such accumulated leave
19 time prior to the commencement of the employee’s final compensation
20 period; and
21
22 d. The employee elects during the final compensation period to cash-out
23 some or all of his or her balance of such leave time.
24
25 e. The amount or “carried over” leave time to be included in ‘final
26 compensation’ shall not exceed the lesser of (1) the amount of leave
27 available on December 31, 2012, or (2) the amount cashed out in the final
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compensation period.

The Court concludes that the doctrine of equitable estoppel does not generally apply to members who may not have been allowed to cash-out leave time during the final compensation period, but rather were only allowed to do so as 'termination pay'. While the Court is willing to assume that such members would indicate that they remained in employment in the expectation of inclusion of accumulated leave cash-outs at termination being included in their pension calculation, such expectation does not rise to the level necessary to establish an 'injury' sufficient to bring the doctrine of equitable estoppel into play.

An exception appears to apply to Merced members, if any, that would otherwise qualify for application of the doctrine of equitable estoppel excepting for the fact that their accumulated 'banked' leave was only payable upon termination. Their reliance upon the litigated judgment in the *Baker* litigation would make their reliance similar to that of those who relied upon being encouraged to take a cash out in their final compensation period and they are entitled to be similarly protected.

Services Outside of Normal Working Hours

The amendment of Section 31461 created by AB 197 adds a new subsection (b) that includes the following:

"(b) "Compensation Earnable" does not include in any case, the following:
....

EXHIBIT A

1 (3) Payments for additional services rendered outside of normal working hours,
whether paid in a lump sum or otherwise”.

2 Whether or not this provision is “new law” as to any specific type of compensation
3 depends entirely upon the specific facts that make up the compensation item. For
4 instance, the provision clearly applies to overtime pay, but that category has been
5 excluded since the Ventura opinion itself, thus does not involve vested rights.
6

7 In various briefings the members have contended that compensation that is
8 paid for “on-call”, “standby”, or “call back” time has, until the respective retirement
9 boards changed their positions based upon the enactment of AB 197, been included
10 in final compensation.⁹ One thing that is clear is that the wording “outside of normal
11 working hours” was not included in the CERL provisions previously. The state
12 contends that this language is merely “clarification” and that the provisions for
13 ‘compensation earnable’ that referred to “average number of days ordinarily worked”
14 was equivalent.
15

16 Prior to AB 197 there appears to have existed no appellate authority that
17 addressed whether payment to an employee that has regular working hours but is
18 also compensated, by agreement with the employer, for time “on-call” to return when
19 needed would be included in ‘final compensation’. In the view of this Court § 31461
20 has contained an ambiguity as to this type of compensation, at least in
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25 ⁹ The Court assumes that there is no “timing” issue with these items, i.e. that these items have not
26 historically been ‘accumulated’ or ‘banked’ but are items both earned and payable during the final
compensation period.

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1 circumstances where the responsibility is regularly required, such as is shown by the
2 Declaration of Rocky Medeiros filed on January 27, 2014.

3 Unfortunately the settlements made after Ventura did not distinguish between
4 the various circumstances under which an employee may receive these types of
5 compensation. The Contra Costa settlement called for inclusion of pay codes 19 and
6 32, for instance, which are simply labeled “Call Back/Weekend” and “On Call Pay”. It
7 appears, therefore, that compensation to an employee in Mr. Medeiros’ position
8 would be included in compensation earnable but so would compensation for an
9 employee that was asked to work overtime by simply “being on call tonight in the
10 event needed”. Likewise, time that an employee was “on call” during the final
11 compensation period due to a voluntary assumption of the obligation (such as by
12 ‘swapping’ time for a previous time frame) would not be includeable.
13

14
15 The Alameda settlement did not make specific reference to items such as “on
16 call pay”, unless the reference to “shift premiums” was so intended, but it appears
17 that prior to AB 197 ACERA allowed such pay items to be included as well.

18 The stipulation filed by the parties to the Merced proceeding states that
19 Merced CERA pay codes 301, 302, 306, 307 and 408, which are similar items, are “in
20 issue”, leading to this Court understanding that prior to AB 197 these items were
21 included as pensionable.
22

23 Since a change has occurred in the practices of the respective boards in
24 dealing with “on call” type compensation, the issue of whether or not legacy
25 employees have become “vested” in the prior practice will depend upon the question
26

1 of whether, for each particular circumstance, the practice was allowable, i.e. in
2 conformance with the requirement that it be within the inclusion of “days ordinarily
3 worked”.

4 The variance in circumstances, however, makes it inappropriate for this Court
5 to issue a writ of mandate with general provisions. The circumstances of Mr.
6 Medeiros, for instance, would appear to suggest that a vested right exists, but that
7 view cannot be extended *carte blanche* to the various pay codes of the various
8 counties. It does appear that the Attorney General is prepared to agree that in the
9 limited circumstances where the legacy employee has received compensation for
10 ‘required’ stand by or on call time that he or she may be vested in the right to have
11 such of that time as is earned in the final compensation period included in “final
12 compensation”, limited of course to that which was the requirement during the final
13 period and excluding such things as “swapped” time from another employee.
14
15

16 Based upon the foregoing the Court will issue a writ of mandate directing the
17 respective retirement boards to refrain, as to legacy employees, from automatically
18 excluding “on call”, “stand-by” or similar pay code compensation situations from
19 ‘compensation earnable’ and directing such boards to make a factual determination,
20 individually as to such retirees, including such pay in ‘compensation earnable’ in
21 those limited circumstances where the pay category was previously included and the
22 amount to be included was both earned and required of the employee during his or
23 her final compensation period. This exception, providing inclusion for such ‘vested’
24 employees, only applies where regularly applicable to the class of employees and not
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1 to employees who received such compensation, or any part thereof, to 'enhance' the
2 pension.

3 The petitioners and interveners do not appear to provide this Court with any
4 other categories of compensation or remuneration that has been included in the past
5 but is now excluded by the requirement of "normal working hours". The original
6 petitions in each of the three counties simply seek a general writ or restraining order
7 that bars the respective retirement boards from considering §31461 (b) (3) as to all
8 future retirements of legacy employees and such a broad mandate is denied.

9
10 The burden lies with the petitioner seeking a Writ of Mandate that limits the
11 action of a government agency on the basis that such action would violate a
12 constitutional right of the petitioner. This requires the petitioner to establish (1) that
13 the petitioner has a specific right, (2) that action by the government agency has been
14 undertaken or threatened that would interfere with that right, and (3) that the
15 petitioner will be injured by the taking of the threatened action. Petitioners have not
16 met this burden with respect to any other compensation that is now required to be
17 excluded by §31461 (b) (3).
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21 **Compensation Paid to Enhance a Pension**

22 The parties are not in dispute that the requirement of new subsection (b) (1) of
23 amended Section 31461 is new law insofar as it places upon the board of CERA
24 retirement associations the obligation to determine whether specific compensation
25 has been paid to a new retiree "to enhance a member's retirement benefit". The
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1 subsection then provides that such compensation “may include” the following:

2 “(A) Compensation that had previously been provided in kind to the member by the
3 employer or paid directly by the employer to a third party other than the retirement
4 system for the benefit of the member, and which was converted to and received by
5 the member in the form of a cash payment in the final average salary period.

6 “(B) Any one-time or ad hoc payment made to a member, but not to all similarly
7 situated members in the member’s grade or class.

8 “(C) Any payment that is made solely due to the termination of the member’s
9 employment, but is received by the member while employed, except those payments
10 that do not exceed what is earned and payable in each 12-month period during the
11 final average salary period regardless of when reported or paid.”

12 In response to this new requirement, at least one of the retirement boards has
13 changed its policy on certain pay codes that appear to be “one time” payments, or
14 the like, to indicate that they will be excluded from ‘final compensation’. The
15 petitioners object to this “categorical” exclusion, urging that it fails to use the
16 procedure which is required by Government Code §31542. It appears, however, that
17 the respective boards have adopted administrative procedures which meet the
18 requirements of §31542 (see for instance the ACERA action of March 21,2013,
19 Exhibits B and C to the Request for Judicial Notice filed February 6, 2014). The Court
20 proposes to deny writ relief upon this aspect of the petitions “without prejudice” and
21 allow implementation of the new code requirements to proceed with minor
22 adjustments made if found necessary by the parties.

23 A review of the settlements that occurred after the Ventura opinion was issued
24 shows that it was and is generally accepted between those that negotiate pension
25 provisions and the retirement boards that unusual payments do not qualify as
26 “average” compensation as defined in subsection (a) of Section 31461. Accordingly it

1 appears to be pure speculation that, with the three retirement boards that are before
2 this Court, any practice that has been in effect beyond those otherwise covered by
3 subsections (2), (3) and (4) of the new subsection (b) will fall within the parameters of
4 subsection (1). It is essential to note that the subsection does not mandate exclusion
5 of these items, it only states that compensation created to enhance may be suspect.
6 Significantly, however, it is doubtful that if a practice of including special 'one-time'
7 payments made in the final compensation period existed prior to AB 197 any member
8 could claim to be 'vested' in such a practice when it is purely conjecture that the
9 member would be one of those persons that is granted such a payment.
10

11
12 **Conclusion**
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14 At the hearing on March 7, 2014, counsel for petitioners requested that the
15 Court address the issue of refunds that might be due to members whose retirement
16 contributions were calculated based upon actuarial assumptions that included
17 pension benefits that are excluded based upon this decision. As none of those issues
18 are before the Court from either the original petitions or any interventions, the Court
19 declines, without prejudice, to address that issue.

20 Judgments in each of the pending matters will be issued accordingly.
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22 Dated: May 12, 2014
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24 _____
25 Judge of the Superior Court
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The requests for judicial notice of the various parties, including intervenors, are all granted subject to the limitation that declarations and other documents containing hearsay are used only to determine that a party has made a particular claim and not for the truth of the facts that are stated in support of the claim. Joslin vs. H.A.S. Insurance Brokerage (1986) 184 Cal. App. 3rd 369, 374.

The following materials were reviewed and used by the Court in reaching the conclusions of law set forth above:

- First Amended Joint Stipulation of Facts (Contra Costa) filed August 14, 2013.
- State Request for Judicial Notice, exhibits 1, 2, 3, 13 and 14.
- Request for Judicial Notice of Petitioners Alameda County Deputy Sheriffs' Association, et al, exhibits A, B, and C, Supplemental Request exhibits A and B, and Declaration of Jon Rudolph with various MOUs attached.
- Request for Judicial Notice of Merced County Sheriff's Employees' Association, et al, San Francisco Superior Court Judgment.
- Request for Judicial Notice of Intervenors IFPTE Local 21, et al, MOUs exhibit A, B, C, D, E and F, and Declaration of David Rolley.
- Central Contra Costa Sanitary District's request for judicial notice, exhibits A, B, C and D.
- Request for Judicial Notice of AFSCME, locals 512 and 2200, exhibits B, H, I ,J Z various actuarial valuations and reports (C,D,E,V,W,X and Y) and various legislative materials (K,L,M,N,O,P,Q,R and S).
- Request for Judicial Notice of Service Employees' International Union, local 1021, exhibits GG, JJ and NN.
- Declaration of Annie Yen, with various MOUs attached, and Declarations of Kurt Schneider, Robbie White, Kathy Foster, Rudy Gonzalez and Richard Cabral.
- The Stipulation re Merced CERA Board Actions implementing AB 197.