



## MEMORANDUM

To: ACERA's Participating Employers  
From: Marguerite M. Malloy, ACERA Associate Counsel  
DATE: November 11, 2013  
Re: DSA Lawsuit- AB 197 Litigation- Preliminary Issues Under  
Consideration by Contra Costa Superior Court Honorable Judge Flinn

The Honorable Judge Flinn, Contra Costa County Superior Court has issued his decision in the first phase of the DSA Lawsuit. There remain many questions, and many issues left to resolve.

We wanted to get you a report of the decision and allow you the chance to forward questions to us by email which we will respond to, likely in the form of a website publication so that our members may benefit from the information and responses.

Please forward your questions to me via email and we will work to get responses to you, and also post the most common questions and answers on our website.

### **Summary of Decision in Phase 1:**

Judge Flinn has issued his Preliminary Opinion on the primary Phase One question posed in this litigation: Were the accrued leave cash-out practices of the retirement boards authorized by the law defining "compensation earnable" before the passage of AB 197?

Judge Flinn's 20-page Preliminary Opinion issued Friday, November 8, 2013 concludes that the answer to the question is "no."

He declares that the law under CERL section 31461, *Ventura, In re Retirement Cases, Salus* and analogous cases decided under the PERS law did not give retirement boards the discretion to include any amounts in "compensation earnable" and "final compensation" that were not both earned and payable during the final compensation period. He specifically finds that the value of time earned in periods outside of the final compensation period, whenever paid in cash, could not properly have been included in pensionable compensation.

Having stated what he believes the rule has been since at least *Ventura*, the Court reserves for another day the determination of the impact of the CCCERA, ACERA and MCERA settlement agreements entered into post-*Ventura*. He declares that “[c]onsideration of the effect of those settlements will therefore be held for consideration until a determination of the vesting issues [e.g., the Petitioners’ vested rights claims] is made” after the next hearing to be held on **December 10, 2013**.

As to other subordinate issues that were presented at the October 31, 2013 hearing on Phase One (such as on-call and standby pay, in kind cash-outs, ad hoc payments, etc.), the Court observes that as to such matters “judicial intervention would only be appropriate on a case by case basis and not by a general and sweeping writ of mandate.”

Meanwhile, the Court **expressly disclaimed** that this Preliminary Opinion should affect any rights at this stage: “The Court considers this to be a preliminary determination...**It is not the intention of the Court that this interim ruling shall have a binding effect upon any employee, retiree, retirement board, or government entity funding retirement funds.**”