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August 2, 2010

Honorable Justices
California Supreme Court
350 MacAllister Street
San Francisco, California 94102

Re: *Retired Employees of Orange County v. County of Orange,* U.S. Ninth Circuit Appeal No. 09-56026—Request for Certification

Honorable Justices:

On behalf of Plaintiff/Appellant Retired Employee Association of Orange County ("REAOC"), we are writing with regard to the Ninth Circuit Court of Appeals' June 29th, 2010 Order Certifying Question to the California Supreme Court in the above referenced matter. (*See REAOC v. County of Orange* (9th Cir. 2010) --- F.3d ---, 2010 WL 2593674.) REAOC would like to respond to the letter submitted to this Court on July 19, 2010 by Defendant/Appellee County of Orange ("the County"), to correct misstatements of the law contained in that letter.

I. THERE IS NO STATE LAW "PRESUMPTION" AGAINST VESTING OF PUBLIC EMPLOYEES' RETIREE MEDICAL BENEFITS.

The County argues that California Government Code section 31692 "provides an express presumption against the vesting of retiree health benefits provided by California counties." (County Letter at 2.) This is plainly incorrect. Section 31692 states that "[t]he adoption of an ordinance or resolution *pursuant to Section 31691* shall give no vested right to any member or retired member . . ." (Cal. Gov't Code § 31692 [emphasis added].) Section 31691, which appears in Title 3 of the Government Code, is *one* statute that authorizes municipalities to provide health insurance benefits to their retired employees.[1] It includes detailed provisions that link the provision of and payment for such health benefits to

[1] "The board of supervisors of any county by ordinance . . . may provide for the contribution" towards retiree health insurance premiums. (Cal. Gov't Code § 31691.) When a county board passes an ordinance providing such benefits under section 31691, they are funded from "Supplemental Retiree Benefits Reserve" accounts maintained by the municipality's pension board. (*Id.* at § 31691(d).)

available surplus funds of the pension systems of participating municipalities. (Cal. Gov't Code § 31691(d); § 31618.)

The provision of health benefits to county retirees is separately authorized by another statute, section 53205, which appears in Title 5 of the Government Code.[2] There is no indication—either in section 53205 or the chapter in which it appears (section 53201 *et seq.*)—that the Legislature intended to forbid, or create a "presumption against," the vesting of retirement health benefits provided under *that* statute.

It is undisputed here that the County relied on the authority of section 53205, not section 31691, when it established and maintained the retiree premium subsidy. In fact, the County has never even attempted to demonstrate, in the district court or the Ninth Circuit, that it passed an ordinance, or took any other action, to invoke section 31691 or to implement its specific funding requirements. Further, the County itself has acknowledged, in prior litigation over retiree medical benefits, that its employee and retiree medical benefits were provided pursuant to section 53201 *et seq.*[3]

The Court must decline the County's request to expand the scope of section 31692 to include all retiree medical benefits provided by any local government under *any* statutory scheme; if the Legislature intended such a sweeping rule, surely it would have said so. "[I]f a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute *indicates an intent the provision is not applicable to the statute from which it was omitted.*" (*In re Calhoun* (2004) 121 Cal.App.4th 1315, 1346 [emphasis added]; *see also Phillips v. San Luis Obispo County Dept. etc. Regulation* (1986) 183 Cal.App.3d 372, 228 ["Where the Legislature has employed a term or phrase in one place and

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[2] "The legislative body [of a county] may authorize payment of all, or such portion as it may elect, of the premiums . . . for health and welfare benefits of officers, employees, retired employees . . .". (Gov't Code § 53205.)

[3] In *O.C.E.A. v. County of Orange* (1991) 234 Cal.App.3d 833, the County's largest union sued to force the County to provide equal health benefits to active and retired employees. The union's sole argument on appeal was that such equal treatment was required by section 53205.2, which stated that counties must "give preference to" health plans that treated active and retired employees equally. The County agreed that section 53201 *et seq.* was the statutory scheme under which it provided health insurance benefits, but argued that section 53205.2 required only that it "prefer" plans with equal benefits, not that it "choose" such plans. (*Id.* at 837 n.1, 840.)

excluded it in another, it should not be implied where excluded."].) Thus, the fact that the Legislature included an express "no-vesting" clause in one statute authorizing counties to provide retiree medical benefits (section 31692), but declined to include such a clause in another (section 53205), indicates an intent *not* to preclude vesting under the latter. (*Gonzales & Co. v. Department of Alcoholic Bev. Control* (1984) 151 Cal.App.3d 172, 178-79 ["The fact that a provision of a statute on a given subject is omitted from other statutes relating to a similar subject is indicative of *a different legislative intent for each of the statutes* . . . [w]here a statute with reference to one subject contains a certain vital word, omission of that word from a similar statute on the same subject is significant to show a different intention."] [emphasis added].)

Section 31692 simply has no application to the retirement benefits at issue in this case, and there is no general state-law "presumption" against the vesting of retirement health benefits for public employees.

II. THE COUNTY MISCHARACTERIZES THE HOLDINGS OF SEVERAL CALIFORNIA COURT OF APPEAL CASES.

In its letter the County relies heavily on two opinions of the Court of Appeals which were decided at approximately the same time in 1991: *O.C.E.A. v. County of Orange* (1991) 234 Cal.App.3d 833 [*supra* n. 4], and *Ventura County Retired Employees' Assoc. v. County of Ventura* (1991) 228 Cal.App.3d 1594. But neither case involved the question presented in this litigation (and in this certification request), that is, whether retired employees have a *contractual* right to promised health benefits. Rather, in both cases the plaintiffs relied exclusively on a particular statutory requirement (in Government Code section 53205.2) that counties "give preference to" health plans that provide equal benefits to active and retired employees. In neither case did the court even address contractual rights, implied contract principles, the interpretation of MOUs, or the "vesting" of promised retirement health benefits.

The County also relies on *Sappington v. Orange Unified School District* (2004) 119 Cal.App.4th 949, 954 for the proposition that courts refuse to find vested rights unless the express language of a legislative enactment showed an intent to do so. But, as Judge Fletcher correctly observed during oral argument in this case, *Sappington* stands for precisely the opposite proposition. The *Sappington* court held that the school district's policy of "underwriting" retiree health insurance *did* create a contractual right in retirees to continue to receive that benefit. The battle in that case was over the meaning of the word "underwrite." The retirees argued that it meant "pay the entire cost of" any plan a retiree chose.

The court rejected that argument, observing that the common meaning of the term underwrite was to pay a *portion* of, and the retirees had presented no *evidence* that the district's practice of paying 100% of retiree premium for *all* available health plans (PPO and HMO) had ripened into an implied promise to continue to do so. (*Id.* at 954-55.) Thus, the court concluded, the district had satisfied its contractual obligation to retirees by (1) allowing them to enroll in district-sponsored health plans *and* (2) "subsidizing" the premium costs of at least one of those plans. (*Id.*)

Sappington therefore stands for the propositions that (1) an employer's policy of providing retiree health benefits *does* create a contractual obligation to continue to do so for its retired employees, and (2) a court must examine both the policy and the parties' course of dealing to determine the nature and scope of the retirees' contractual right.[4]

III. THE COUNTY'S CONCERN THAT THIS COURT MIGHT ISSUE AN "ADVISORY OPINION" IS BASELESS.

The County has repeatedly expressed concern that this Court might issue an impermissible "advisory opinion" if it does not adopt the County's proposed reformulation of the certified question. That concern is not well taken. Rule 8.548 establishes that this Court will accept certification only if the question (as proposed by the requesting court or re-phrased by this Court) "may determine" part of the appeal pending before the requesting court. (*See Ventura Group Ventures, Inc. v. Ventura Port District* (2001) 24 Cal.4th 1089, 1093.) The fact that the requesting court may be required to perform additional analysis—for example by applying a standard as established or clarified by the State Supreme Court—does not render the certification or the answer improper. (*See Travelers Ins. Co. v. Carpenter* (2nd Cir. 2005) 411 F.3d 323, 327 n.3.)

The question as phrased by the Ninth Circuit certainly meets the "may determine part of the appeal" requirement. The threshold questions presented in this appeal are (1) whether the County is correct in asserting that there exists a *per se* prohibition against implied terms arising in public employment; and (2) whether retirement health benefits may be unilaterally revoked from public employees *after* they retire. As explained in its July 19, 2010 letter to this Court, REAOC believes that its proposed re-phrasing of the certified question clarifies

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[4] It is important also to note that the *Sappington* plaintiffs were not represented by unions during their employment with the district and so were not claiming any rights arising under MOUs. The *Sappington* court did not mention or apply the rules and precedents that guide a court's interpretation of express and implied terms in collective bargaining agreements. (*Sappington*, 119 Cal.App.4th 949.)

that the single question presented by the Ninth Circuit is in fact two separate questions. However, whether this Court accepts the question as presented, or adopts REAOC's proposed restatement, this Court's answer to the question(s) will not constitute an impermissible advisory opinion.

Concerns about advisory opinions aside, this Court is of course free to restructure the question to include more of the particular factual circumstances of this case. REAOC would certainly have no objection to this. However, if the Court adopts this approach, REAOC respectfully requests that it carefully consider *all* of the relevant facts surrounding the County's 23-year uninterrupted history of providing this retiree health premium subsidy, *as* a post-employment benefit and an element of employees' deferred compensation, which was (by the County's own admission) included as an implied term in the MOUs in effect during that period. That history is set forth in great detail in REAOC's Opening Brief before the Ninth Circuit, at pp. 12-32.

Sincerely,

MOSCONE EMBLIDGE & SATER LLP

M. Brown SCS

Michael P. Brown

CERTIFICATE OF SERVICE

I, OMAR LATEEF, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed with Moscone Emblidge & Sater LLP, 220 Montgomery Street, Suite 2100, San Francisco, CA 94104.

On August 2, 2010, I served:

Letter dated August 2, 2010, to The Honorable Justices, California Supreme Court, Re: Retired Employees Association of Orange County, Inc. v. County of Orange, No. 09-56026, Response Letter regarding the Ninth Circuit Court of Appeals' June 29th, 2010 Order Certifying Question to California Supreme Court

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows and served the named document in the manner(s) indicated below::

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☒ **BY MAIL:** I caused true and correct copy(ies) of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) named above and, following ordinary business practices, placed said envelope(s) at the Law Offices of Moscone Emblidge & Sater LLP, 220 Montgomery, Ste. 2100, San Francisco, California, 94104, for collection and mailing with the United States Postal Service and there is delivery by the United States Post Office at said address(es). In the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed August 2, 2010, at San Francisco, California.

OMAR LATEEF