SUPREME COURT OF THE STATE OF CALIFORNIA
No. S184059

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RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY,
Petitioner,

vs.

COUNTY OF ORANGE,
Respondent.



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After Order Of This Court Accepting Certification Of Question From The United States Court of Appeals For The Ninth Circuit

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# PETITIONER'S ~~OPPOSITION~~ Response TO AMICUS BRIEF FILED BY COUNTY OF SONOMA AND COUNTY OF CONTRA COSTA IN SUPPORT OF RESPONDENT COUNTY OF ORANGE

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On February 14, 2011 this Court granted the application of the County of Sonoma and the County of Contra Costa ("the Counties") for permission to file a late amicus brief. Petitioner Retired Employee Association of Orange County ("REAOC") files this brief in response to the Counties' Amicus Brief. While most of that brief is simply a re-hash of the erroneous legal arguments and unsupported factual assertions already made by Respondent County of Orange and its other Amici, REAOC would like to briefly address several new contentions raised by the Counties.

## I. THE COUNTIES' NEW ARGUMENTS DO NOT UNDERMINE REAOC'S SHOWING THAT PUBLIC EMPLOYMENT AGREEMENTS MUST BE READ TO INCLUDE EXPRESS AND IMPLIED-IN-FACT TERMS RELATING TO ALL ASPECTS OF THE EMPLOYMENT RELATIONSHIP.

In its Opening and Reply Briefs, REAOC demonstrated that, under settled principles of contract law, public employment agreements must be read to include implied-in-fact terms arising from an employer's policies and practices and the parties' course of dealing. (REAOC Opening Brief at 33-53; REAOC Reply Brief at 4-30.) REAOC further demonstrated that the exception to this rule on which the County relies—that implied terms are *not* permitted where they are expressly prohibited by statute—is inapplicable here because there is no statutory prohibition against implied-in-fact terms in county employment related to retirement benefits, or any other element of

employee compensation. (*Id.*; *see Youngman v. Nevada Irrigation District* (1970) 70 Cal.2d 240, 246-47 ["Governmental subdivisions may be bound by an implied contract if there is no statutory prohibition against such arrangements."].)

The Counties cite *California Statewide Law Enforcement Association v. California Department of Personnel Administration* (2011) 192 Cal.App.4th 1 ("*CSLEA*"), for the proposition that a governing body must expressly approve contract provisions that require the expenditure of government funds. In *CSLEA*, the issue was whether the State Department of Personnel Administration had the authority to bind the State to a retroactive implementation of a reclassification of certain State employees from "miscellaneous" to "safety member" status for purposes of pension calculations. The Legislature had approved an MOU that implemented that reclassification, but the MOU was silent as to whether it was prospective only, or also applied retroactively to turn prior "miscellaneous" service into "safety" service for purposes of pension calculations. (*Id.* at 9-10.)

The court held that the MOU's silence on this matter could not be construed as an implied agreement to make the changes retroactive. (*Id.* at 15-17.) In reaching that conclusion, the court relied on particular provisions of the statute that governs *State* employer-employee relations, the Ralph

Dills Act, Government Code section 3512 *et seq.* (*Id.* at 14-16.) Specifically, Government Code section 3517.6 requires that, "[i]f any provision of the memorandum of understanding requires the expenditure of funds, those provisions . . . may not become effective *unless approved by the Legislature in the annual Budget Act*" (emphasis added). Because the retroactive application of the reclassification involved a large expenditure of State funds, and because the Legislature had not formally approved such retroactive application, the reclassification could lawfully be prospective only. (*Id.*)

The Counties ignore the specific statutory context in which *CSLEA* was decided, and insist that this Court apply its holding universally to prohibit any implied terms from arising in any MOU between any public agency and its employees. However, the Ralph Dills Act differs significantly from the statutory scheme that governs relations between local governments and their employees, the Meyers Milias Brown Act, Government Code sections 3500 *et seq.* ("MMBA").

Both the MMBA and the Ralph Dills Act contain general provisions requiring that MOUs be "prepared" by the parties and "presented" to the legislative body "for determination." (*See* Gov't Code §§ 3517.5 [Dills Act] and 3505.1 [MMBA].) However, *only* the Dills Act contains the additional

requirement that MOUs which "require the expenditure of funds" be expressly "approved" by the Legislature in a particular annual statutory enactment. (Gov't Code § 3517.6(b).) The *CSLEA* court explicitly relied on this latter requirement in holding that retroactive application of the position reclassification could not be "implied" in an MOU.

The Counties provide no basis for this Court to take particular requirements from the Dills Act and graft them onto the MMBA. Indeed, this Court has recognized that the laws governing State employment have developed separately from the laws relating to other public employees. In *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 177-78, this Court explained that in 1972 the Legislature attempted to address public employment issues by crafting "a comprehensive bill covering all public employees." It failed to do so, however, and "decided instead to draft *separate collective bargaining statutes* directed to the *specific needs and problems* of different categories of public entities." (*Id.* at 177 [emphasis added].)

With regard to State employer-employee relations, the Legislature acted to "afford[] state employees significant new rights," but "at the same time . . . retained substantial control over state employee compensation and many other terms and conditions of state employment." (*Id.* at 178.) One of

those tools of "control" was Government Code section 3517.5(b)—the requirement that an MOU "requiring the expenditure of funds does not become effective unless it is approved by the Legislature in the annual Budget Act." (*Id.*) This Court observed that, "*under this provision*, virtually all salary agreements are subject to prior legislative approval." (*Id.*; *see also White v. Davis* (2003) 30 Cal.4th 528, 572 [repeating *Pacific Legal Foundation* Court's observations regarding history of section 3517.6(b)].)

In light of the particular history and purpose of the technical requirements of section 3517.6, and the Legislature's decision not to impose any similar requirement on the approval of *local* government MOUs that "require the expenditure of funds," the *CSLEA* court's holding is simply inapplicable to this dispute.

The Counties also cite *California Association of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, for the proposition that the government is not deemed to "surrender" its sovereignty unless it does so in "unmistakable terms." (*Id.* at 383-84.) However, the *California Association* case involved the narrow question whether the Legislature could bind itself to pension promises with respect to *future* State employees. (*Id.* ["A promise not to change the character of a pension program *as to new employees* is a fundamental constraint on the freedom of

action of the Legislature"; as such it must be expressed in "unmistakable terms."] [emphasis added].) The court underscored the importance of the strictly prospective nature of the asserted rights: "this distinction appears significant, because generally the contractual basis of a pension right is the *exchange* of an employee's services for the pension right offered by the statute and thus *future employees do not have a vested right in any particular pension plan.*" (*Id.* [emphasis added and quotations omitted].)

Here, REAOC has never challenged the County's authority to alter the terms of employment as to future employees, or even as to current employees. Rather, REAOC seeks to vindicate the contract rights of *retired* employees, who have already completed the "exchange" of labor for compensation. *California Association* is therefore inapposite. (*See California Teachers Association v. Cory* (1984) 155 Cal.App.3d 494, 504-06 [government surrenders its general sovereignty, and may be bound by *implied* contract obligations, where there exists an "element of exchange" between itself and third parties, such as public employees].) [1]

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[1] This "element of exchange" provides an additional basis to distinguish *CSLEA*, *supra*. The controversy in that case was over whether employees would receive "extra" pension compensation for work already performed, by virtue of retroactive application of position classifications. (*CSLEA*, 192 Cal.App. 4th 1.) Here, by contrast, the issue is whether retirees are entitled

Finally, the Counties argue that the implied-in-fact contract doctrine cannot apply where it would give rise to "long-term" commitments that would "dominate" counties' budgets. (Counties' Amicus at 11.) But the Counties cite no authority for the legal proposition that an element of employee compensation that is paid over time after it is earned (in this case, during retirement) should be treated any differently than elements that are paid "all at once," and/or paid at or near the time they are earned (such as wages, accrued vacation pay, "early retirement" incentive bonuses, *etc.*). Moreover, the Counties' alarmist assertions regarding the impact of the cost of retirement health benefits, is not supported by *any* evidence. In fact, in this case the undisputed evidence is that the benefit at issue in this litigation would have cost the County of Orange less than $1 million per year. (*See* REAOC Opening Brief at 29-31.) That represents just $167 per year, per retiree, and a minuscule .023% of the County's annual revenues—hardly a cost that would have "dominated" the County's budget.

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to receive *exactly* what they exchanged their labor for, that is, the entire package of retirement health benefits offered by the County to induce them to take and remain in County employment.

## II. THE COUNTIES' AMICUS DOES NOTHING TO UNDERMINE REAOC'S SHOWING THAT RETIREMENT HEALTH BENEFITS MUST BE PAID ONCE THEY ARE EARNED, THAT IS, UPON RETIREMENT.

REAOC demonstrated that retirement health benefits, as elements of employee compensation, must be deemed "vested" as to those employees who have retired while those benefits were in effect. That is, an employee "earns" retirement health benefits as part of the labor-for-compensation exchange, and those benefits must be paid just like any other element of employee compensation, once the employee retires. (REAOC Opening Brief at 55-60; REAOC Reply Brief at 33-40; *see also* Amicus Brief of California Retired Employees Association *et al.* at 19-27 [in absence of express provisions regarding "vesting," courts must look to extrinsic evidence such as the nature of the benefit to determine whether retirees have contractual right to receive retirement health benefits promised during employment].)

The Counties contend that in making this argument REAOC and its Amici are "conflating" retirement health benefits with pension benefits. (Counties' Amicus at 14-15.) Not so. REAOC's position is simply that retirement health benefits—like wages, accrued vacation, accrued sick leave, *and* pensions—are elements of employees' compensation. As such, they

must be paid once they are earned, in this case, upon retirement. (*See Olson v. Cory* (1980) 27 Cal.3d 582, 535-36 ["Public employment gives rise to certain obligations which are protected by the contracts clause of the Constitution . . . [p]romised compensation is one such protected right.].)

For the foregoing reasons, the Court should reject the arguments presented by the Counties in their amicus brief.

Dated: March 16, 2011

Respectfully Submitted,

MOSCONE EMBLIDGE & SATER LLP

By: _____
Rachel J. Sater

I, MARDOUX TORRISE, 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 March 16, 2011, I served:

**PETITIONER'S OPPOSITION TO AMICUS BRIEF FILED BY COUNTY OF SONOMA AND COUNTY OF CONTRA COSTA IN SUPPORT OF RESPONDENT COUNTY OF ORANGE**

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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☒ **MAIL:** I caused true and correct cop(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 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 March 16, 2011, at San Francisco, California.

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MARDOUX TORRISE