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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, INC.,

Plaintiff,

v.

COUNTY OF ORANGE,

Defendant.

Case No. SACV-07-1301 AG (MLGx)

PLAINTIFF'S RESPONDING BRIEF RE REMAND

Judge: Hon. Andrew J. Guilford

Complaint Filed: November 5, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Regulations

SUMMARY OF ARGUMENT

The County's Opening Brief ("County OB") barely acknowledges the California Supreme Court's answer to the Ninth Circuit's certified question. The County is in denial of what is now the settled law of this case: counties and their employees can enter into contracts that include implied terms regarding vested retirement health benefits, and such terms "may be implied from an ordinance or resolution when the language or circumstances accompanying its passage clearly evince a legislative intent" to create enforceable rights. *Retired Employees Association of Orange County v. County of Orange*, 52 Cal. 4th 1171, 1177 (2011) ("*REAOC III*"). Under the County's head-in-the-sand reading, however, the words "circumstances accompanying" are not even there, and retirees have no security unless they got it in writing. That was never the law in California, as *REAOC III* clearly held. Merely reciting the County's mantra—that retirement benefits are simply gratuities or a form of welfare that sprung from the Board's "magnanimous spirit"—does not make it so.

Whether the County acknowledges it or not, its legal argument has been swept away by *REAOC III*. The undisputed facts now govern this case. Those facts, reiterated again below, show that the series of Board resolutions that approved the pooling of premiums, and adopted Memoranda of Understanding ("MOUs") from 1985 through 2007, were part of a bilateral contractual relationship under California's municipal employment collective bargaining law, the Meyers Milias Brown Act (MMBA). The Board directed that collective bargaining sessions from 1985 through 1991 include negotiations regarding the Retiree Premium Subsidy, as part of a package of retiree health benefits, and the Board won massive financial concessions from the unions based in part on the assurance that the pooled rate structure would continue. In collective bargaining sessions from 2005 through 2007 the Board recognized the Retiree Premium Subsidy as an implied term in the existing MOUs, and as part of the Retiree Medical Program that it offered to attract and retain its workforce. For 23 years each annual rate resolution included a recognition of the County's "policy and practice" of pooling premiums, and

thereby subsidizing retiree healthcare. The County's actuarial studies recognized that the County had an *obligation* to continue the pooled rate structure for current retirees. These and other items of extrinsic evidence recognized that the Retiree Premium Subsidy "vested" for employees who retired while it was a component of the Board's Retiree Medical Program.

With the law now clarified by *REAOC III*, and the undisputed facts clear that the Retiree Premium Subsidy was not simply a matter of "magnanimous spirit," but instead was a benefit earned by REAOC's members, Plaintiffs' motion for summary judgment must be granted, and the County's motion denied.

ARGUMENT

I. THE COUNTY OVERSTATES THE IMPACT OF A PRESUMPTION AGAINST CONTRACTUAL DUTIES ARISING FROM LEGISLATION

The County strains to shoehorn this dispute into the category of cases where government employees rely entirely on statutorily-created contracts, such as those arising a public employee retirement system for unrepresented employees. *See* County Opening Brief ("County OB") at 12-14. The County also invites this Court to commit an error of California law by treating this case as if it were *Markman v. County of Los Angeles*, 35 Cal. App. 3d 132 (1973), where the public employee sought to imply a complete contractual obligation from conduct. *See REAOC III*, 52 Cal. 4th at 1182 (cautioning the "limited force" of *Markman* where the parties have already entered into bilateral contracts). The pertinent acts of the Board in this case were not undertaken in its policy-making role—the role which justifies any presumption that it can later change its mind--but rather in its role as a party to collective bargaining agreements under the MMBA. *Id.*

That the Board was acting in its MMBA contracting role rather than its broad policy role, is one of the factors that must be considered in determining whether contractual rights are implied from its actions. *Id.* at 1187. While *REAOC III* discusses the presumption against implying contractual obligations from legislation, it nowhere

holds that such a presumption applies in this case, where the Board's actions concern existing bilateral contractual relationships under the MMBA.

Even if such a presumption were applied, however, REAOC's overwhelming evidence, as discussed below, more than rebuts it.

II. REAOC'S EXTRINSIC EVIDENCE CLEARLY ESTABLISHES THAT THE BOARD INTENDED THE TO CREATE "PRIVATE RIGHTS OF A CONTRACTUAL NATURE" WITH RESPECT TO THE RETIREE PREMIUM SUBSIDY.

A. REAOC Has Identified All Of The Board Resolutions Relevant To Its Contracts Clause Claim.

The County contends that REAOC did not identify any labor contracts or other resolutions from which an implied contract right could arise. *See* County OB at 9-13. This argument is not only wrong, it is disingenuous. In its summary judgment briefing in 2008, and throughout the appeal, REAOC made it clear that its implied contract claims were supported by two sets of Board legislation: labor agreements and rate resolutions.

First, REAOC demonstrated that the Board-approved memoranda of understanding ("MOUs") and Personnel Salary Resolutions ("PSRs") in effect between 1985 and 2007 must be read to include implied terms reflecting the parties' course of dealing and bargaining history.[1] The County acknowledged that this legislation formed a basis for REAOC's claims when it submitted these very same labor agreements to this Court as part of its summary judgment briefing, and submitted them *again* to the California Supreme Court during the proceedings on certification. *See* Docket No. 106 at Exhs. A through GG; REAOC's Second Request for Judicial Notice, Exh. A at 1-2.

Second, REAOC pointed to the annual health premium rate resolutions enacted between 1985 and 2007, as evidence of the Board's intent to confer contractual rights to the Retiree Premium Subsidy. *See* Docket No. 117 at 43; Docket No. 146 at 15. As with

[1] *See* Docket No. 117 (REAOC's Opening Brief ISO Summary Adjudication) at 36-47; Docket No. 161 (Reply Brief ISO Summary Adjudication Motion) at 12-20.

the MOUs and PSRs, the County has expressly acknowledged that REAOC relied on these resolutions as bases for its implied contract claim. *See* REAOC Second RJN, Exh. A at 1-2 (County files rate resolutions from 1985 through 2007 because "[a] principal argument of [REAOC] in this matter is that by enacting annual rate legislation . . . that set retiree rates equal to active rates . . . the County created an implied contract . . .").

B. This Court Must Consider *All* Extrinsic Evidence Relevant To Determining The Board's Intent.

The County suggests that this Court limit its analysis to only a few of the "circumstances" relevant to REAOC's claim, namely, "Board minutes," "staff reports" and "applicable case law" prior to the adoption of the resolutions. *See* County OB at 19. However, the County cites no authority for this proposition, and the law is to the contrary. It is settled—especially after *REAOC III*—that this Court's analysis must embrace *all* relevant extrinsic evidence of the Board's intent. *REAOC III*, 52 Cal. 4th at 1183 (determination of REAOC's claim depends on whether the labor agreements "or *any other circumstances*" established an implied right to a single unified pool) (emphasis added); *see also Scott*, 11 Cal. 4th at 463 (applying a "totality of the circumstances" test to determine whether extrinsic evidence demonstrated an intent to contract with respect to the term at issue); *Rhode Island Laborers' Dist. Council v. State of Rhode Island*, 145 F.3d 42 (1st Cir. 1998) (evidence of whether statute creates contract "may include not only the words used but also apparent purpose, context, and *any pertinent evidence of actual intent* . . .") (emphasis added); *see generally* 5 McQuillin, *Municipal Corporations*, § 20:44 ("An ordinance must be construed in light of *all criteria of construction available*.") (emphasis added).

Under *REAOC III*, and cases cited therein, one critical category of evidence relevant to the Board's contractual intent is the parties' "course of dealing," including their bargaining history, their conduct subsequent to the formation of a contract, and their established and longstanding policies and practices. At pages 1178-1179 of its opinion, the *REAOC III* Court confirmed that: (1) implied contract terms are "manifested by

conduct"; (2) "experience and practice can now trigger the incorporation of *additional, implied terms*" in written employment contracts; and (3) collective bargaining agreements, in particular, "often contain implied, as well as express terms" which derive from "the parties' practice, usage, and custom." *REAOC III*, 52 Cal. 4th at 1178-79 (emphasis added). At page 1190, the Court approved of the "analytical approach" taken by the Court of Appeal in *Sappington v. Orange Unified School Dist.*, 119 Cal. App. 4th 949, 954-955 (2004), that is, examining "extrinsic evidence of the parties' course of conduct" to determine whether the employment agreement included an implied promise to provide a particular retiree health benefit throughout retirement. *REAOC III*, 52 Cal.4th at 1190. Also at page 1190, the Court cited with approval *Lawrence v. Town of Irondequoit*, 246 F. Supp. 2d 150, 167 (W.D.N.Y. 2002), in which the court held that extrinsic evidence of a public employer's policies and practices regarding provision of retirement health benefits, *could* establish that retirees had contractual rights to those benefits. *REAOC III*, 52 Cal.4th at 1190.

The Board is presumed to have been aware of these settled principles of contract interpretation and collective bargaining throughout the period in which it adopted the relevant labor agreements and rate resolutions. *City of San Jose v. Operating Engineers Local Union No. 3*, 49 Cal. 4th 597, 606 (2010) (noting the "legal presumption that the Legislature is deemed to be aware of existing judicial decisions that have a direct bearing on the particular legislation enacted."). Further, the Board is presumed to have been aware of the "customs" of collective bargaining, including the long-settled rule that implied-in-fact terms arise from the parties' course of dealing and settled practices. *Bernard v. City of Oakland*, 202 Cal. App. 4th 1553, 1569 (2012) (legislatures are presumed to "have in mind" the "actual conditions to which the [legislation] will apply," including the "customs and usages" of the subject "industry or activity"), *quoting Irvine Co. v. California Employment Com.*, 27 Cal. 2d 570, 581 (1946).

Finally, the Board is "presumed to be aware of a long-standing administrative practice" relating to its legislation. *Id.* at 1569. And, while Board staff and others

charged with interpreting and administering its legislation cannot technically "bind" the Board, their interpretations and conduct *are* relevant evidence of the Board's intent with regard to that legislation. *See Beverly Hills Firemen's Assn., Inc. v. City of Beverly Hills*, 119 Cal. App. 3d 620, 628 (1981) (staff statements can be evidence of Board's intent with respect to compensation terms in MOUs); 5 McQuillin, *Municipal Corporations*, § 20:45 (the interpretation of those persons charged with administering and implementing legislation is "*highly persuasive* with regard to legislative intent in enacting the ordinance or statute and, consequently, the meaning of the statute or ordinance.") (emphasis added).

More specifically, the conduct of municipal authorities "*prior to the controversy*" is "very persuasive." *Id.* at § 20:51 (emphasis added). This rule of construction of legislative intent "is frequently applied to ordinances which are developed from actual experience in the management of complicated details" of municipal affairs. *Id.* Such is the case here; there are few, if any, more "complicated" matters for a board of supervisors than the management of labor relations with tens of thousands of employees and multiple unions, over many years and involving hundreds of terms and conditions of employment. *See REAOC III*, 52 Cal.4th at 1179 ("collective bargaining agreements are intended to govern a myriad of cases which the draftsmen cannot wholly anticipate") (quotations omitted).

C. The Circumstances Accompanying The Passage Of The Labor Agreements Clearly Establish That The Board Intended The Retiree Premium Subsidy To Be "Contractual" Rather Than "Gratuitous."

Under *REAOC III*, this Court must determine whether the language of the identified labor agreements, and/or the circumstances accompanying their passage, clearly indicate the Board's intent that the Retiree Premium Subsidy be of a "contractual nature," rather than, as the County argues, a mere gratuity. *REAOC III*, 52 Cal. 4th at 1187; *see also Dodge v. Board of Education of Chicago*, 302 U.S. 74, 77-78 (1937) (government may eliminate a retirement benefit that was conferred as a "mere gratuity," but not one that "involved an agreement of the parties"); *Larsen v. Senate of the Commonwealth of Pennsylvania*, 154 F.3d 82, 90 & n. 11 (3rd Cir. 1998) (same).

REAOC has made an overwhelming showing of the Board's *contractual* intent.

1. The Parties' Bargaining History From 1985 Through 1992 Clearly Demonstrates The Board's Intent To Make The Retiree Premium Subsidy A Component Of The Contractual Exchange With Its Employees.

The Board established the pooled rate structure effective 1985, and that it did so knowing it would result in the subsidization of retiree premiums, as compared to a "split pool" structure. *See* Docket No 124 at 3-4. In collective bargaining sessions from 1985 until 1991, the Board and the unions negotiated over the unions' demand that the Board underwrite retiree health insurance on the same terms that it paid for active employee coverage. *See id.* at 4-7; Docket No. 128 at 4-6; Docket No. 125 at 2-3. The Board's authorized labor negotiators responded by pointing out that the Board already provided a retiree health benefit—the Retiree Premium Subsidy. *See id.*

While these negotiations were ongoing, the unions were litigating with the County to force it to pay for retirees' health premiums in the same way it paid active employees' premiums. The unions' claim was based not on any "contractual rights" theory, but rather on Government Code section 53205.2, which mandated that governments "prefer" health plans that provide equal benefits to retirees. *See Orange County Employees Association v. County of Orange*, 234 Cal. App. 3d 833, 838 (1991). In 1991 the Court of Appeals rejected the unions' statutory claim. It recognized that the Board currently "subsidized" retiree health care, through the pooled rate structure, as part of its "comprehensive [health insurance] plan available to employees and retirees." *Id.* It concluded, however, that the Board was not *statutorily* required to provide benefits *in addition to* that subsidy, to bring retiree health benefits in line with those of active employees. *Id.* at 842-843.

In the fall of 1991 and continuing into 1992—at the same time that the unions lost their statutory claim in the Court of Appeal—the parties' contractual negotiations regarding retirement health benefits intensified. The undisputed evidence shows that, during these negotiations, the Board's goal was not only to respond to the unions'

demands for a better retirement health benefit package, but also to convince them to agree to (1) surrender their claim to $150 million sitting in a disputed pension reserve fund, and (2) fund the proposed "new" retiree medical benefit (the Grant) from the remaining $50 million of that fund (rather than from County general funds). *See* Docket No. 128 at 7-8; Docket No. 124 at 4-6; Docket No. 125 at 4-6 & Exhs. D-G. The unions continued to press their demand for additional retirement health benefits, and, with respect to the pension reserve fund, argued that (1) those monies belonged to employees and retirees, rather than the County; and (2) the new Grant benefit should be paid for out of County funds, rather than the pension reserve account. *See id.*

At these bargaining sessions the Board's chief negotiator—Dave Carlaw—presented the unions with charts showing the monthly "cash value" of the Retiree Premium Subsidy, along with the cash value of a proposed Grant benefit and annual pension benefits, to demonstrate what the retirement benefits "package" would look like *if* the unions agreed to the Board's proposed terms. *See* Docket No. 125 at 4-6; Docket No. 125-2 at 1-28; Docket No. 150 at 1-8. Mr. Carlaw's undisputed testimony is that, in addition to characterizing the Retiree Premium Subsidy as an existing component of the retirement benefits package, he expressly represented to the unions that the Board would continue to pool rates and thereby subsidize retiree premiums as it had been doing since 1985. *Id.*[2] The unions ultimately agreed to the Board's proposed deal; the Board adopted the MOUs and PSR that implemented the new Grant benefit program. *See* Docket Nos.

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[2] At his July 29, 2008 deposition, before the County produced his contemporaneous negotiation notes from these sessions in discovery, Mr. Carlaw testified that (1) he did not recall an express promise that the pooled rate structure would continue, but (2) the promise to do so was "implied throughout" the negotiations. *See* Docket No. 154-2 at 44-52. Once the County finally produced those notes to REAOC, and REAOC presented them to Mr. Carlaw, he recalled that he *did* make express assurances that the pooled rate structure and resulting subsidization of retiree premiums "would continue." Mr. Carlaw amended his testimony to reflect his refreshed recollection. *See* Docket No. 150 at 1-3.

106-4, 106-5, 106-24, 106-25, 217-1 through 217-13.

2. The Parties' Bargaining History Between 2005 and 2007 Confirms The Board's Understanding And Intent That The Retiree Premium Subsidy Was A Component Of The Contractual Exchange With Employees.

The parties' conduct subsequent to the formation of a contract is a key item of evidence indicating what they themselves believed the contract to be and to require. *See* section II-B, *supra*. "In ascertaining the intent of the parties to a CBA, the trier of fact . . . may consider the parties' conduct subsequent to contract formation . . . *and such conduct is to be given great weight*." *Arizona Laborers, Teamsters & Cement Masons Local 395 v. Conquer Cartage Co.*, 753 F.2d 1512, 1517-18 (9th Cir. 1985) (emphasis added). When the Board began its effort to eliminate the Retiree Premium Subsidy in 2005, its conduct plainly demonstrated that it considered that benefit to be reflected in the then-current labor agreements, and that it understood that it could remove it from the MOUs not by legislative fiat, but only through negotiation.

Shelly Carlucci was the Board's chief negotiator and the County's designated PMK with regard to retiree medical benefit negotiations. She testified that the Board understood it could not simply split the pool unilaterally, but must instead negotiate that change with the unions, because it was a component of the County's "Retiree Medical Program" and was "in the MOUs." *See* Docket No. 127-2 at 6-7; 24-25.

The Board did in fact bargain with the unions (active employees) to get their agreement to remove the Retiree Premium Subsidy from the MOUs in 2006 and 2007. The 2007 and 2008 MOUs and PSR reflected the split pool as a "changed term" as compared with the prior agreements. In fact, the Board received and reviewed these new agreements, in which the "split pool" was highlighted in bold as a changed term, along with cover memos that highlighted the split pool as a "new" or "changed" term from the prior agreement. *See, e.g.*, Docket No. 217-15 at 6; 127-6 at 9, 20. The County's witnesses confirmed that this was the practice that Board staff followed to ensure that the Board understood what terms were changing in the new MOU as compared to the

existing agreement. *See* Docket No. 127-2 at 6-7; 20-24; Docket No. 154-2 at 149-151.

This conduct—the evidence of which is undisputed—cannot be squared with the County's litigation position, that the Board conferred the Retiree Premium Subsidy for 23 consecutive years as a mere gratuity, and remained free to change that policy and practice when it saw fit. Rather, the evidence confirms what the Board had done decades before, that is, confer *contractual* benefits with respect to the Retiree Premium Subsidy.

After REAOC relied on Ms. Carlucci's admissions in its summary adjudication motion, the County attempted to re-write her answers by submitting a declaration that flatly contradicted those prior admissions. Ms. Carlucci declared that, when she referred to the "program" being "in the MOU," she meant the 1993 Grant Plan only, *not* the Retiree Premium Subsidy. *See* Docket No. 139 at 2-3. This is simply not credible.

First, the County attempts to support Ms. Carlucci's about-face by pointing to her deposition testimony that the Retiree Medical Program was "mostly" and "primarily" the Grant program. *Id.* But to say that the Retiree Medical Program was "mostly" or "primarily" the Grant program is *perfectly consistent* with Ms. Carlucci's other testimony, that the Retiree Premium Subsidy was *also* a component of that Program.[3]

Second, Ms. Carlucci herself submitted 2006 and 2007 MOUs, in support of the County's summary judgment motion, which included charts depicting the "Modifications" that were being made to the "Retiree Medical Program." *See* Docket No. 217-15 at 108. The *first* change listed in the chart was: "Eliminate the implied subsidy (split the pool)." Similarly, the County's Employee Benefits Director—Patricia Gilbert—testified before the Board in 2005 that one of her proposed changes to the "Retiree Medical Program" was "removing" the Retiree Premium Subsidy. *See* Docket No. 127-6 at 53-54. If the Board was working to "eliminate" or "remove" the Retiree

[3] In fact, the Retiree Medical Program *was* "primarily" the Grant program, in terms of the cost of that benefit as compared to the Retiree Premium Subsidy (approximately a four-to-one ratio). *See* Docket No. 127-5 at 50.

Premium Subsidy *from* the Retiree Medical Program in 2005 and 2006, the Retiree Premium Subsidy must have been part of that Program prior to its "removal."

Third, Tom Beckett—the architect of the Board's 2008 retiree medical restructuring—confirmed Ms. Carlucci's deposition testimony, that the Grant benefit *and* the Retiree Premium Subsidy were both components of the County's "Retiree Medical Program." *See* Docket No. 127-2 at 54:11-21; 60:3-18.

Fourth, in 2005 the Board contracted with an outside consultant, Bartel & Associates, to work with Board staff to prepare an actuarial report on the unfunded liabilities related to the County's "retiree medical program." *See* REAOC Second Request for Judicial Notice, Exh. A at 1. Bartel came back with a report that plainly and repeatedly characterized the "Retiree Medical Program" as being comprised of the Grant benefits *and* the Retiree Premium Subsidy. *See* Docket No. 127-5 at 50, 52.

Finally, putting aside Ms. Carlucci's testimony confirming that the Retiree Premium Subsidy was a component of the Retiree Medical Program, which in turn was "in the MOU," she also testified *directly* that "one of the changes [she] negotiated to the MOU was the splitting of the pool." *See* Docket No. 127-2, Exh. A at 20:24-21:1. The County attempts to correct *this* problem by having her "declare" the precise opposite: that "splitting the pool . . . was *not* a change to a term of an existing MOU." *See* Docket No. 139 at 4 (emphasis added). However, a party may not raise a genuine dispute of fact by submitting declarations that directly contradict sworn deposition testimony.[4] *Van Asdale v. International Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009). The County's attempt to salvage Ms. Carlucci's testimony must be rejected.

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[4] Mr. Beckett also echoed Ms. Carlucci's deposition testimony in this regard when he testified that the "new" MOUs, which implemented the split-pool premium structure, "*changed the terms of the prior labor agreements* with respect to" the Retiree Premium Subsidy. *See* Docket No. 127-2 at 62:1 – 63:2 (emphasis added).

D. The Circumstances Accompanying The Passage Of The Rate Resolutions Clearly Establish That The Board Intended The Retiree Premium Subsidy To Be "Contractual" Rather Than "Gratuitous."

REAOC explained in its Opening Brief that the parties' past practices are a strong indicator of contractual intent, and that here the undisputed evidence shows that for 23 years the Board had an announced, perfectly consistent "policy and practice" of subsidizing retiree premiums through the pooled rate structure. *See* REAOC OB at 8-17.[5]

The County has argued that the Board's public announcements regarding this policy and practice "don't count" because they were drafted by outside consultants and appear in exhibits to the rate resolutions, rather than in the body of the resolutions themselves. *See* Docket No. 134 at 17-18. However, there is no dispute that these memoranda were physically attached as exhibits to the resolutions approving "pooled" health premium rates. *See* Docket No. 107-14; Docket No. 107-17 through 107-30. Exhibits attached to board legislation comprise part of the "text" of that legislation. *Lin v. City of Pleasanton*, 176 Cal. App. 4th 408, 417 (2009) ("text" of ordinance includes "documents that are physically attached as exhibits"). Further, in its own declaration filing these resolutions with this Court, the County testified that these specific memoranda were submitted each year "*for approval by the Board*." *See* Docket No. 107 at 7-9 (emphasis added). Further still, the County characterized the documents as a component of the "board *legislation*" relating to health premiums. *Id.* (emphasis added). Finally, while the County attempts to distance the Board from these memoranda, the express statements they contain merely *confirm* what the Board is presumed to know already: that its longstanding policy was to subsidize retiree health insurance premiums by maintaining the pooled rate structure. *Bernard*, 202 Cal.App.4th at 1569.

In addition to being aware that its policy and practice was to provide the Retiree

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[5] *See* Docket No. 107-14 at 11, 16; 107-17 at 18; 107-18 at 16; 107-19 at 13; 107-20 at 13; 107-21 at 13; 107-22 at 13; 107-23 at 15; 107-24 at 14; 107-25 at 72; 107-26 at 18; 107-27 at 17; 107-28 at 31; 107-29 at 20; 107-30 at 26.

Premium Subsidy, the Board must be presumed to have been aware of the settled law of contracts, and the settled custom in collective bargaining relationships, that maintaining such a longstanding, consistent and recognized practice in the context of collective bargaining meant that the practice would become an implied term in the parties' labor agreement. *City of San Jose*, 49 Cal.4th at 606; *Bernard*, 202 Cal.App.4th at 1569.

E. The Board's Commissioned Actuarial Studies Regarding The Retiree Premium Subsidy Confirm the "Contractual Nature" Of That Benefit.

Another item of "conduct" evidencing the Board's contractual intent is its commissioning of several actuarial studies to examine the Retiree Premium Subsidy and the current and future costs of providing that benefit. These reports repeatedly and unambiguously characterized the Retiree Premium Subsidy as an "Other Post-Employment Benefit," as that term is defined under Government Accounting Standards Board Rule 45 ("GASB 45"). *See* Docket No. 127-5 at 6-11, 50-52. GASB 45 provides that Other Post Employment Benefits, "like pensions . . . arise from an *exchange* of salaries and benefits for employee services rendered and constitute part of the *compensation* for those services." *See* Docket No. 127-4 at 100 (emphasis added).[6] Thus, the Board's classification of the Retiree Premium Subsidy as an Other Post Employment Benefit under GASB 45 is an unambiguous admission that it recognized that benefit as a component of the parties' *contractual* exchange, rather than a mere gratuity. *See REAOC III*, 52 Cal.4th at 1187.

Further, in authorizing the preparation of these reports, the Board commissioned the consultants to analyze its "pension and *retiree medical liabilities*," and those reports included the Retiree Premium Subsidy as one of those liabilities. If the Retiree Premium Subsidy was a "liability" of the Board, it could not have at the same time been a mere "gratuity" that the Board doled out when it had spare cash in its annual budget.

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[6] GASB 45 required public employers to publicly report their Other Post Employment Benefit liabilities. *See* Docket No. 127-5 at 23.

The County attempts to escape this admission by contending that the authors of these reports were Board staff and outside "consultants," and that their characterization of the Retiree Premium Subsidy does not reflect the *Board's* understanding or intent. This argument fails for two reasons. First, the Board's acceptance of such statements and characterizations *is* relevant extrinsic evidence of the Board's intent with respect to terms of employment. *Beverly Hills Firemen's Assn.*, 119 Cal. App. 3d at 628 (fact that city council "received and acted upon" a resolution describing a prior MOU as being duly adopted by resolution, is "extrinsic evidence" that the council interpreted the prior MOU as being duly adopted by resolution). Here, there is no dispute that the Board commissioned, received, accepted and acted upon these reports, by proceeding to take steps to *eliminate* the Retiree Premium Subsidy, precisely *because* it was a "liability" and met the definition of an earned "Post Employment Benefit" under GASB. *See* Docket No. 127-5 at 22-24.

Second, the County's PMK regarding the restructuring of the Retiree Medical Program unequivocally testified that (1) the Board defined the Retiree Premium Subsidy as an Other Post Employment Benefit under GASB 45, *and* (2) that he was "confident that that decision was correct." *See* Docket No. 127-2 at 57:1-8. Thus, even putting aside the Board's contemporaneous admission, the County has *in this litigation* admitted the "contractual nature" of the Retiree Premium Subsidy.

F. The County's Proffered Extrinsic Evidence Of Board Intent Does Nothing To Undermine REAOC's Conclusive Showing.

1. In *OCEA v. County of Orange*, The Court Said Nothing About Contractual Rights To The Retiree Premium Subsidy.

The County contends that the Court of Appeals' ruling in *Orange County Employees Association*, 234 Cal. App. 3d at 838, is an extrinsic "circumstance" that proves that the Board did not intend to create contractual rights to the Retiree Premium Subsidy. *See* County OB at 20. But the court's holding in that case was strictly on the question of the Board's *statutory obligation* under section 53205.2 to provide retirement benefits *in addition to* the Retiree Premium Subsidy already provided. *OCEA*, 833 Cal.

App. 3d at 842-843. It does not even purport to address the subject of Board's intent to create *contractual* rights to that benefit.

2. The Board's Annual Changes To Premium Rates Does Nothing To Undermine The Contractual Nature Of Its Consistent, Bargained-For Rate-Setting *Structure*.

The County has argued that the Board could not have intended to confer long-term contractual benefits to the Retiree Premium Subsidy, because active and retiree premium *rates* changed on an annual basis, usually increasing as compared to the prior year. The County points out that David Carlaw testified in his deposition that "the Board had the right to change the [premium] rates" and that there was no promise "to go and maintain the same rates forever." *See* Docket No. 134 at 19:3-7. This observation is true, but entirely irrelevant. Of course health insurance premium rates changed annually, and REAOC has never argued that the Board promised to "freeze" premium rates for retirees. Rather, the Board impliedly promised to continue the premium-setting *methodology*—the pooled rate *structure*—and the subsidization of retiree premiums that flowed from it.

The County's argument reinforces REAOC's theory of this case. There was no implied promise to freeze premiums because, *un*like the pooled rate structure, (1) there was no longstanding, recognized practice of freezing premiums year-to-year; (2) the premiums in effect during a particular year were never characterized as a retirement "benefit" or explicitly incorporated into the parties' bargaining; (3) the Board never classified the annual rates as a "post-employment benefit" or an element of employees' deferred compensation; and (4) the Board's negotiators never referred to the annual rates as a component of the Retiree Medical Program or as being reflected in an MOU.

3. The County's Proffered Witness Testimony Is Irrelevant.

The County offers declaration testimony from two witnesses, to the effect that the Board never "committed itself" in the pre-1993 bargaining sessions to continue the pooled rate structure for any specific period of time. *See* Docket No. 134 at 18 (quoting Declarations of Jan Walden and Judy Cheek). If these witnesses are testifying that they

never heard or saw an express commitment from the Board, then the testimony is irrelevant; REAOC is relying on a course of conduct and other extrinsic evidence to establish an *implied* contract claim. If these witnesses are testifying that whatever they saw at these bargaining sessions did not constitute a *legal* commitment from the Board, that testimony is not reasonably based on facts within their personal knowledge, but rather is an impermissible lay legal opinion. *See* Fed. R. Evid. 701; *Nationwide Transport Finance v. Cass Information Systems, Inc.*, 523 F.3d 1051, 1059-60 (9th Cir. 2008). In either case, these declarations do nothing to call into question REAOC's conclusive showing of the Board's contractual intent.

The County's reliance on deposition testimony of REAOC witnesses is likewise unavailing.[7] Several REAOC members answered "no" when asked whether they had seen or heard a "promise" or "contract" from the Board saying they would receive the Retiree Premium Subsidy indefinitely. *See* Docket No. 134 at 19:13-19; 19:20 – 20:5; 20:6-9. The questions were ambiguous, especially in the context of this litigation, because a "promise" or "contract" could mean either an express promise, or some legal commitment arising by implication from conduct. The witnesses' answers clarified the ambiguity in the questions, and were perfectly consistent with REAOC's claim. Each witness explained that to their knowledge there was no express promise, but they understood the Board to have made an implied commitment to continue the pooled rate structure for employees who had retired while that structure was in effect. *See* Docket No. 154-2 at 91-93; 98-105; 18-23.

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[7] The County misleadingly excerpts testimony from REAOC members, in the Declaration of Arthur Hartinger, Docket No. 115. REAOC urges the Court to review the *actual* deposition transcripts, rather than counsel's inadmissible declaration regarding that testimony. *See Davis v. City of Seattle*, 2008 WL 202708 at *11 (W.D. Wash. 2008) ("The Court, however, does not regard as evidence plaintiff's quotations from documents or her characterizations of deposition testimony. The written materials and transcripts speak for themselves. *See* Fed. R. Evid. 1002.").

4. The "Retiree Medical Plan Document" Is Entirely Irrelevant.

The 1993 Retiree Medical Grant Plan Document purports to disclaim the creation of any "vested" rights to "the benefits provided hereunder," that is, the benefits provided *pursuant to that document*. *See* Docket No. 128-2 at 28-29. However, the County has expressly admitted, the Retiree Premium Subsidy was *not* provided "thereunder," that is, pursuant to the 1993 Plan Document. The purported non-vesting clause is therefore inapplicable on its face. *See* Docket No. 154-7 at 14-15.

III. REAOC'S EXTRINSIC EVIDENCE CLEARLY ESTABLISHES THAT PRE-2008 RETIREES EARNED THE RIGHT TO RECEIVE THE RETIREE PREMIUM SUBSIDY THROUGHOUT RETIREMENT.

The second phase of this Court's inquiry involves the determination whether the Retiree Premium Subsidy "vested" as to those employees who retired prior to 2008.[8] *REAOC III*, 52 Cal.4th at 1177. "Whether an implied term creates vested rights . . . is a matter of the parties' intent." *REAOC III*, 52 Cal.4th at 1177; *see also id.* at 1189. Like the preliminary question of "contractual" intent addressed in section II-B above, the parties' intent with respect to vesting may be express *or* implied from extrinsic circumstances. *Id.* at 1190 ("public employee benefits, in appropriate circumstances, could become vested by implication"), *citing California League of City Employee Associations v. Palos Verdes Library Dist.*, 87 Cal. App. 3d 135, 140 (1978) (finding "implied vested rights" to certain employment benefits), *Lawrence*, 246 F. Supp. 2d at 167 (rights to retirement health benefits may vest by implication); *and Sappington*, 119 Cal. App. 4th at 954-955 (court "relied on … extrinsic evidence of the parties' course of conduct" to determine whether a retiree medical benefit was "vested" as to particular

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[8] The benefit of the commingled pool evaporates for most retirees once they turn 65, and Medicare becomes the primary insurer; the actual "duration" of the benefit was for most retirees fewer than 10 years. There are a number of (older) retirees who will never be eligible for Medicare; they depended on the County health plans—with their pooled, subsidized premiums—as their only available insurance.

retirees); *see also Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224-25 (9th Cir. 1994).

The California Supreme Court expressly rejected the County's contention that "vested" implied rights were somehow disfavored—pointing out that the County failed "to offer any legal authority for this distinction" between non-vested and vested implied rights in post-employment benefits. *REAOC III*, 52 Cal. 4th at 1189. Nor has the County yet offered any authority for such a distinction. As set forth below, *all* of the extrinsic evidence indicates that the Retiree Premium Subsidy was vested as to pre-2008 retirees.

A. Retiree Medical Benefits Comprise An Element Of Compensation And As Such May Not Be Reduced Or Eliminated After Retirement.

The Contracts Clause protects a public employee's right to receive all the compensation he or she earned, whether that compensation is in the form of immediate salary, or "deferred" until retirement. *Olson v. Cory*, 27 Cal. 3d 532, 535-36 (1980). As the *REAOC III* Court confirmed, retirement health benefits are not "gratuities," but rather comprise an element of employee compensation. *REAOC III*, 52 Cal.4th at 1185, 1191-1192, *citing Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 780 (1982) (retirement health benefits "do not derive from the beneficence of the employer, but are properly part of the *consideration earned by the employee*") (emphasis added), *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburg Plate Glass*, 404 U.S. 157, 180-81 & n.20 (1971) ("To be sure, the future retirement [health] benefits of active workers are part and parcel of their overall compensation."), *and Navlet v. Port of Seattle*, 194 P.3d 221, 232 (Wash. 2008) (like pension benefits, negotiated retirement health benefits of public employees form part of the "total compensation package," and therefore must be deemed earned, and vested, upon retirement).[9]

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[9] PERB has likewise held "that future retirement benefits for employees are … part of an employee's compensation package," and that "employees can take their compensation as current wages, present health benefits, or future health/pension benefits." *California School Employees Assoc. v. Madera Unified School District*, PERB Dec. No. 1907 at 2-3 (2007) (emphasis added).

The Ninth Circuit has echoed this observation. *See International Brotherhood of Elec. Workers, AFL-CIO Local 1245 v. Citizens Telecom. Co.*, 549 F.3d 781, 786-87 (9th Cir. 2008) ("future retirement benefits are part and parcel of an active employee's compensation"). In *Bower*, 725 F.2d at 1224-25, the Ninth Circuit approvingly cited *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983). In that case, the court held that retiree health benefits are by their nature "status benefits" which "as such, carry with them an inference that they continue so long as the prerequisite status is maintained." *Id.* Thus, "when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue *as long as the beneficiary remains a retiree*." *Id.* (emphasis added).[10]

Here, the evidence regarding the Board's intent that the Retiree Premium Subsidy be a retirement benefit, and an element of compensation, is overwhelming. In the 1991 and 1992 labor negotiations discussed above, the Board presented the Retiree Premium Subsidy to the unions as a post-employment benefit, using charts showing that benefit in one column, the pension benefit in another, and the proposed Grant benefit in the third. Each of these items was given a monthly cash value to show the unions how much the "package" of benefits would be worth. *See* Docket No. 125 at 4-6; Docket No. 125-2 at 1-28; Docket No. 150 at 1-8. The *only* inference to be drawn from this objective manifestation, made at the bargaining table, is that the Board intended the Retiree Premium Subsidy to be, like pension benefits, a component of the retirement benefits package.

In 1998 the Board commissioned an audit of the present and future costs of providing the Retiree Premium Subsidy. The report confirmed that the Retiree Premium

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[10] *See also Maurer v. Joy Technologies*, 212 F.3d 907, 915 (6th Cir. 2000) (retirement health benefits "are typically understood as a form of delayed compensation or reward for past services"); *Keefer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989) (same).

Subsidy was a post-employment *benefit*. *See* Docket 127-5 at 6-11 (1998 report defined "Retiree Medical Benefits" for County active and retired employees as "Grants + *Subsidy*") (emphasis added). The Board commissioned a similar report in 2005, to analyze its "pension and *retiree medical liabilities*." *See* REAOC Second RJN, Exh. A at 1 (emphasis added). That report also repeatedly characterized the Retiree Premium Subsidy as one of the post-employment "benefits" for which the Board was liable. *See* Docket No. 127-5 at 50, 52.

In a PMK deposition, Tom Becket defined "benefit" as "something of value to an employee that's not salary" and that is "related to the relationship between an employee and an employer." *See* Docket No. 127-2 at 64:9-23. He acknowledged, with conviction, that the Retiree Premium Subsidy fit the definition of a "post-employment benefit." *See* Docket No. 127-2 at 56:3-8.

In its 2006 RFP seeking litigation counsel to defend the retiree lawsuit that the Board anticipated would follow its retiree medical benefits "restructuring," County Counsel observed that the Retiree Premium Subsidy was "not *expressly* included in the Plan or any memorandum of understanding or other agreement with employee bargaining units." *See* Docket No. 127-8 at 71 (emphasis added). Nevertheless, County Counsel characterized the Retiree Premium Subsidy as one of the "post-employment *benefits*" that the County "currently offers" its employees, and referred to it as a retirement benefit "program." *Id.* at 70-71 (emphasis added).

A 2007 Agenda Staff Report to the Board states that "[t]he primary components" of the Board's post-employment *benefits* obligations are the Retiree Medical Grant "and the pooling of current and retired employees for the purpose of determining health insurance premiums." *See* Docket No. 127-5 at 37-38.

When the Board successfully negotiated to remove the Retiree Premium Subsidy from the MOUs effective 2008, the Auditor-Controller proclaimed that the elimination of the Retiree Premium Subsidy, *inter alia,* had "significantly altered *post-employment health care benefits*" offered by the Board. *See* Docket No. 147 at 23 (emphasis added).

In a letter to the labor unions regarding their 2006 negotiations over retiree medical benefit changes, the Board's authorized chief negotiator described the Retiree Premium Subsidy as an element of employees' "total" and "global *compensation*," and suggested that the parties' negotiations embrace all elements of compensation together. *See* Docket No. 127-5 at 76-77 (emphasis added). The County's PMK regarding negotiations over retiree medical issues, confirmed that this letter reflected the Board's desire to use negotiations over wage issues as an opportunity to more broadly discuss "global compensation," which included salary as well as the Retiree Premium Subsidy and the Retiree Medical Grant. *Id.* at 8:22 – 9:1; 10:7 – 11:11.

In denying that the Board had violated the constitutional ban on gifts of public funds by providing the Retiree Premium Subsidy for 23 years, the County argued that it was not an illegal "gratuity," *because* it was a "benefit" that fell within an exception for expenditures that serve the "public purpose" of helping municipalities lure and retain workers. *See* REAOC RJN, Exh. B (County Resp. Brief in Ninth Circuit) at 47-48, *citing Sturgeon v. County of Los Angeles*, 167 Cal. App. 4th 630, 637-39 (2008) ("the benefits the county provides promote the public interest in recruiting and retaining high caliber [employees] . . . and therefore are not gifts within the meaning" of the ban).

Finally, at oral argument before the California Supreme Court last October, the County's attorney conceded that the Retiree Premium Subsidy was "compensation of sorts." REAOC RJN, Exh. A at 21:7-20.

B. Other Evidence Compels The Conclusion That Rights To Receive The Retiree Premium Subsidy Vested Upon Retirement.

Board staff prepared and disseminated to employees documents called "Health Plan Booklets." These documents expressly link the right to remain enrolled during retirement in County health plans to the right to receive a pension check. This is strong evidence that the parties intended the right to participate in the health plan to be a "lifetime" benefit. *Bower*, 724 F.2d at 1224 ("Since the pension is lifelong, employees may have viewed the related insurance also to be a lifelong benefit."). In *Yolton v. El*

Paso Tennessee Pipeline Co., 435 F.3d 571, 581 (6th Cir. 2006), the court held that the linkage of retirement health benefit eligibility with pension eligibility indicated that the parties' intent was for current employees' future retirement health benefits to be subject to negotiation, but that "someone already retired under a particular CBA continues to receive the benefits provided therein despite the expiration of the agreement itself." *Id.*

If retirees' right to remain enrolled in the health plan became a "lifetime" benefit upon retirement, the closely-related right to pay commingled premium rates did as well. In fact, the parties' history shows that the two benefits (the right to participate and the right to participate at commingled rates) went hand-in-hand, and the value of the latter was a large component of the value of the former.[11] Recent history bears that out: the value of the right to participate in the health plan is rapidly eroding, and for many had disappeared, now that the right to pay *commingled* (subsidized) rates is eliminated.[12]

Indeed, the Court may put to the side for a moment the mountain of evidence that the Board intended the Retiree Premium Subsidy to be a separate benefit and element of compensation. The fact that the "splitting" of the premium pool imposed an enormous additional cost on retirees' right to remain enrolled, throughout their retirement, in the County health plans, constitutes an unlawful impairment of *that* right. "The general rule is that an ordinance which imposes a *material additional burden* or restriction on a party to a contract impairs the obligation of the contract, and this rule governs the contracts of a municipality." *See* 5 McQuillin, *Municipal* Corporations, § 19:74 (emphasis added); *see also Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889-893 (9th Cir.

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[11] Ron Kautz, a former County Employee Benefits manager, testified that he and his staff would advise retiring employees, at "exit" orientations, to exercise their right to remain enrolled in the County health plans, *for the specific purpose* of being able to take advantage of the "large pool" of participants, and "broad base of . . . participation" in those plans. *See* Docket No. 154-21:21 – 23:3.

[12] Since the Board unilaterally split the pool in 2008, retiree premium inflation has more than *tripled* compared to historical inflation under the pooled rate structure.

2003) (city unconstitutionally impaired its contract with utility by departing from established practice by imposing extra fees on utility's right to excavate city streets).

C. In 2006 The Board Acknowledged That The Benefits Of The Retiree Medical Program Were "Lifetime" Benefits.

On June 20, 2006 the Board received a presentation from its Staff regarding proposed changes to the Retiree Medical Program, including the elimination of the Retiree Premium Subsidy. *See* Docket No. 127-5 at 79-106. That presentation stated that there was cause for concern because "the benefit is a *lifetime benefit*." *Id.* at 88 (emphasis added). The County Auditor-Controller confirmed this admission, stating that one of the problems with the unfunded liability of the Retiree Medical Program was that it was, in its then-current form, "a lifetime benefit." *See* Docket No. 127-7 at 14.

D. The Fact That The Board Never Applied A Reduction Of Retiree Medical Benefits Retroactively Is Further Evidence Of Vesting.

The undisputed evidence is that the Board's policy and practice, prior to 2008, was *not* to apply significant changes to medical benefits of existing retirees, but to apply them prospectively only, that is, to current employees/future retirees. *See* Docket No. 128 at 10:16-22; No. 125 at 6:13-15; No. 124 at 8:7-16; No. 126 at 2:22 - 3:1; No. 125-3 at 21. The Board followed this policy because it considered the health benefits *of retirees* to be "vested." *Id.* This is convincing evidence that the Board intended that the Retiree Premium Subsidy—like other retirement health benefits—be "vested" once an employee retired while it was part of the retiree benefits package. *See REAOC III*, 52 Cal.4th at 1190, *citing Lawrence*, 246 F. Supp. 2d at 167 (fact that town never made changes to health benefits of current retirees—prior to the action that led to the lawsuit—was evidence that those benefits were considered vested as to retirees).[13]

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[13] *See also Jensen v. SIPCO, Inc.*, 38 F.3d 945, 951 (8th Cir. 1994) ("all the changes [employer] unilaterally made to its retiree benefits … were prospective only," and employer's "policy of not changing the benefits of prior retirees" is "consistent with the concept of vested benefits").

E. The Fact That The Health Benefits Of Current Retirees Is Not "Negotiable," Is Further Evidence Of Intent To Vest.

In *San Diego Police Officers' Assoc. v. San Diego City Employees' Retirement System*, 568 F.3d 725 (9th Cir. 2009) ("SDPOA"), the Court held that active employees had no vested contractual right to "freeze" the current contractual terms related to retiree medical benefits that current employees can earn in return for their future service. It reasoned that the parties' course of dealing demonstrated that the future health benefits of current employees "were considered a term of employment that could be negotiated through the collective bargaining process." *Id.* at 740 (emphasis added). For people who have already retired, the situation is completely different. Here, the undisputed evidence is that the matter of the health benefits *of retirees* was never negotiated with the unions and indeed was not negotiable through the collective bargaining process. The parties had no historic practice of negotiating retroactive changes to current retirees' benefits because the parties considered them vested. By contrast, the parties actively negotiated about the retirement benefits to be earned in the future, because the parties considered them non-vested. *See Yolton*, 435 F.3d at 581 (future retirement health benefits of active employees were negotiable; health benefits of current retirees were vested).

F. There Is No Evidentiary Support For The Proposition That Rights To The Retiree Premium Subsidy Lapsed When Each MOU Expired.

The County has contended that, if the Retiree Premium Subsidy was a contractual benefit, its duration was limited to the duration of the MOU under which each employee retired. However, the general "duration" clause in a collective bargaining agreement does not govern the duration of retirement health benefits that accrue under that agreement. *Bower*, 725 F.2d at 1223. To determine whether retirement benefits lapsed with each MOU, courts must look to extrinsic evidence of intent, including the parties' course of dealing and past practices. *Id.*

The County's theory is too far divorced from the evidence to be even colorable. It is undisputed that for 23 consecutive, uninterrupted years, the Board provided the Retiree

Premium Subsidy to its retired employees both during the "run out" duration of their last MOU, and then for years *and decades* beyond that. Further, as set forth above, when the Board instructed its staff and consultants to analyze its "liabilities" related to the Retiree Premium Subsidy over the next 30 years, the analyses assumed that the Board would continue with its established policy and practice of paying that benefit to current and future retirees *throughout* their retirement. There was no suggestion that the benefit would be paid out on the basis of the duration of each retiree's MOU.

CONCLUSION

The County's first position in this litigation—that California law prohibited *per se* implied terms in the contractual relationships of counties and their employees with regard to retirement health benefits—has been swept away by *REAOC III*. The County must now face the factual record. That record confirms the common sense view of this case: When the Board lured and retained employees with a package of post-employment benefits, those benefits cannot later be re-categorized as "mere gratuities" that the Board can reconsider and revoke at any time. The parties understood that those benefits were *earned* through work—not magnanimously dispensed as alms.

The record demonstrates that there are no genuine issues of material fact on the question of whether the Retiree Premium Subsidy was part of a contractual agreement to provide a vested post-employment benefit. REAOC's motion for summary judgment must be granted; and the County's motion denied.

DATED: March 19th, 2012

Respectfully submitted,

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By: ***/s/ Michael P. Brown***
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