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,

vs.

CONTRA COSTA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION, et al,

Defendants.

_____/

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

_____/

No. N12-1870

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

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

categories that are not to be included in the calculation of "compensation earnable". By its terms the legislation became effective on January 1, 2013. The Petitioners dispute that the Legislature intended these provisions to apply to all retirements after that date.

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

Background

CERL came into being in 1937 and the basic concept and primary operating procedures have remained substantially unchanged. While various county or agency plans changed from time to time, and some litigation (discussed below) occurred as to disputes regarding pension calculations under various plans, the rules of the various retirement boards were quite stable.

In 1997 the case of Ventura County Deputy Sheriffs' Association v. Board of Retirement (1997) 16 Cal.4th 483 came before the California Supreme Court. Justice Baxter, writing for a majority court, described the litigation:

> "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, unifrm 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.

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

It has been and remains the practice, it appears, for the employing county or agency to report all compensation or remuneration paid to each employee by using various "pay codes" which the respective retirement boards use in determining whether to include or exclude such items in their determination of "compensation earnable", i.e. whether it was, or was not, "pensionable". The task of reviewing the many varied items that might be considered as 'compensation earnable' or 'final compensation' was extensive and the determinations sometimes close calls. Nonetheless the process continued and it would appear from a review of both the materials involved, and the sparse litigation that has occurred, that there has been little dispute as to whether a given type of compensation item is, or is not, included as 'compensation earnable'.

A limited number of issues did, however, arise as to the Ventura decision. Several lawsuits were filed to resolve disputes as to whether the decision was "retroactive" and whether assessments to cover the new items could be assessed "in arrears". Some of those actions also raised issues as to inclusion as 'compensation earnable' of "termination pay" and of employee "pick-up" retirement payments. These matters were consolidated before Judge Stuart Pollack of the San Francisco Superior Court and his determinations appealed to the First District Court of Appeal which decided the consolidated actions as reported in In re: Retirement Cases (2003) 110 Cal.App.4th 423.

Actions filed in Alameda and Merced counties, as described below, were each

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

Procedural Status

The proceedings before the undersigned commenced on November 27, 2012, with the filing of a verified petition for Writ of Mandate filed by Contra Costa County Deputy Sheriffs' Association, United Professional Fire Fighters of Contra Costa County, Local 1230, Ken Westermann and Sean Fawell. Named as respondents were the Contra Costa County Employees' Retirement Association and the Board of Retirement of the Contra Costa County Employees' Retirement Association; they appeared in the action through counsel. The essence of the claim of the original petitioners was that the respondents had determined that they would comply with AB 197 for all retirements occurring on or after its effective date of January 1, 2013, and that the Court should mandate that for legacy employees' retirements the legislation should not be considered applicable. When the respondents' counsel advised that the Association and its Board would defend the correctness of its past dealings but would not take a position upon whether the legacy employees had acquired any

"vested" rights or not, the Court directed that notice be given to interested parties. Various parties sought leave to intervene in the action. The Court granted leave to intervene to many parties, including allowing intervention by the Office of the Attorney General that indicated that it would defend the applicability of the legislation as to all retirements.

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

In case management proceedings the parties were in agreement that significant legal issues are raised by the claims of the petitioners and intervener employee representatives of 'vesting' and the position of the Attorney General that one cannot obtain a vested right to something that the law does not allow. The

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2 The Court raised the issue as to whether or not this was an action that could only be coordinated by Judicial Council Coordination Proceedings as on its face the issues surely were "complex". The case was not presumptively complex and the parties all agreed that time was of the essence in these matters proceeding and that the extended time necessary for JCCP motion proceedings would be 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.

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

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

AB197 and Vesting

There can be no serious dispute with the proposition that while certain legislation might be retroactive, persons affected by the legislation might have obtained contrary rights by contract. In Kern v. City of Long Beach, et al (29 Cal.2d 848 the California Supreme Court stated:

"Although there may be no right to tenure, public employment gives rise to

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

successful. Thus while the court in Miller v. State of California (1977) 18 Cal.3d 808 recited the general rules as to 'vesting' of contract rights, it denied the plaintiff's claim that the employer could not lower mandatory retirement age from 70 to 67, thus lowering the amount that his pension would provide. The Court pointed out that while guaranteed a pension a public employee is not assured of receiving maximum pension benefits.

It becomes clear upon reviewing the entire landscape of California's appellate jurisprudence regarding vesting of pension rights, that the facts and circumstances involved are critical to any determination. Here, the facts that are at the heart of any determination appear to be generally uncontested. For the purpose therefore of determining the rule of law to be applied in considering the issuance of a Writ of Mandate, the Court relies upon the joint stipulation of facts provided by the parties and certain other items of which the Court will take judicial notice. Attached as Exhibit A hereto is a listing of the full depository of documents that the Court has reviewed and considered in reaching its decision.

In this proceeding it also becomes clear that there are distinct differences between the areas of AB 197 that are in dispute. For that reason, the Court will consider three aspects separately: (1) the requirement that compensation is only earnable if 'earned' and 'payable' in the final compensation period, i.e. the "timing" issue, (2) "on call" or "stand-by" time as payment for services inside or outside of normal working hours, and related pay items, and (3) the topic of other payments determined to be for the purpose of enhancement.

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 Members [3] 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".

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

Contra Costa

The primary argument made by the Members is that the settlement made in the actions entitled Paulson v. Contra Costa County Employees' Retirement Association and Walden v. Contra Costa County Employees' Retirement Association which was court approved as a class action, are such a contract. A review of that settlement agreement, Exhibit A of the joint stipulation of facts, finds no such agreement. This is not surprising since "timing" of the various items to be considered for inclusion or exclusion in 'compensation earnable' was not a topic that appeared to be either contained in the claims of the petitioners in that litigation (all retired employees) or negotiated. The applicable part of the printed settlement agreement for this purpose is found in paragraph 14 which states that the parties compromise "as set forth in the inclusions and exclusions identified in Exhibit A". That exhibit to the settlement agreement is entitled "IMPLEMENTING THE 'VENTURA DECISION', INCLUDABLE AND EXCLUDIBLE COUNTY PAY ITEMS, FOR SETTLEMENT PURPOSES". It contains five pages of pay code items, each containing an "explanation", usually a description, and a column entitled "included" which contains "yes" or "no" for each pay code. The pay codes applicable to the 'timing' issue are 62, 63, 72 and 80. They read as follows:

Included	Code	Pay Item	Explanation
yes	62	Sale of Vacation	Value of vacation time sold back to county annually

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.
no	72	Sickleave Payoff	Payment, if made at all, is made only to members who terminate and take a refund of their account.
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.

Members argue that an express contract to include cash-outs of vacation time, or other leave time, whenever 'earned', is found in the "yes" answer to code 62. There is nothing in the wording of that phrase, however, which connotes agreement, *one way or the other*, as to vacation time earned outside of the final compensation period. The inclusion of the phrase "sold back to county annually" is perfectly consistent with the fact that many members will have a three year, rather than one year, final period, thus allowing for 3 annual cash-outs to be included. Further, the analysis urged by Members is inconsistent with pay codes 63 and 80. Those codes appear to fully recognize that Government Code § 31461 requires that only vacation accrual 'earned' in the final period may be pensionable.

Nor does the Court find in any of the collective bargaining agreements ("MOUs") any reference to the timing of 'earning' of leave to be considered in calculating the part of final compensation that is to be made up of vacation or other leave cash-outs. This, too, is consistent with the historical background that shows that Ventura only dealt with the concept of which types of payments other than salary

are included in 'compensation earnable'. [4]

In some instances such 'cash-outs' were considered to be a part of "final compensation" even if the payment was not made until after the employee had actually terminated his or her employment. Even if the Court concludes that leave that is 'cashed-out' must be earned in the final compensation period, the issue therefore remains as to whether such compensation must be payable in the final compensation period. Members contend that the Paulson settlement was an express contract that "lump sum of accumulated, unused vacation paid upon termination, that was earned in the final compensation period" (listed as "paycode 80") would be included in "financial compensation". This position appears to be well-taken, leaving the issue as to whether such a practice is allowable under CERL and / or can create a vested right.

Members are not limited, in any event, in establishing their vested rights, to express contracts. In Retired Employees Assn. of Orange County v. County of Orange (2011) 52 Cal.4th 1171 the California Supreme Court was asked to address the following certified question by the Ninth Circuit Court of Appeals:

> "Whether, as a matter of California law, a California county and its employees can form an implied contract that confers vested rights to health benefits on retired county employees".

4 "Which payments to a county employee other than base pay must be included when determining an employee's final compensation is a question crucial to the proper administration of a CERL pension 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.

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

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

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

It is interesting to note that based upon the California Supreme Court decision the Ninth Circuit Court remanded the underlying action by the Retirement Association to the District Court for a determination as to whether or not, under the guidelines provided, an implied contract existed. The District Court found no such contract and dismissed the action. The Association appealed. In a written decision issued February 13, 2014, the Ninth Circuit affirmed the District Court decision. Retired Employees Association of Orange County v. County of Orange (9th Cir., 2014) 2014 U.S. App. LEXIS 2748.

Acknowledging that the County and its retired employees have a binding express contract for the provision of health insurance after retirement (based upon MOUs expressly approved by the County Board of Supervisors) the February opinion finds no express contract as to 'pooling' of health insurance benefits and examines

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

The issue of implied contract in pension benefit cases also arose in Joe Requa v. The Regents of the University of California (2012) 213 Cal.App.4th 213. Plaintiffs in that action challenged a change in the provisions of group health insurance coverage that occurred when the Lawrence Livermore National Laboratory moved from management by the University under a DOE contract, to management by a separate consortium with a new management contract. While upholding the sustaining of demurrer upon an "express contract" ground, the Court of Appeal reversed the ruling made on an "implied" contract basis. The primary allegations in support of such a contract related to the publication of benefit brochures and similar publications that the University Retirement Service had provided to Lab employees during its years of operation.

5 After the District Court reached its decision the Ninth Circuit Court issued an opinion reaching a similar result in Sonoma County Association of Retired Employees v. Sonoma County (9th Cir. 2013) 708 F 3d 1109.

The issue of "timing" of leave accruals came before the Contra Costa County Employees' Retirement Board in January 2010. A power point presentation by the Association's counsel, Exhibit F of the Joint Stipulation, summarizes the practices then in place. The most direct portion of the presentation on the "timing" topic is found at page 10 of the exhibit in a slide entitled "Example #2" which shows the method by which an employee with more than one year's accrued vacation can cash out, under then current policy, about 3 years accruals ("about ¼ of a year"). In January 2011 the Association published to its employees a "General Member Retirement Benefits Handbook" which is Exhibit Q to the joint submission. While there are some ambiguities in the brochure as to 'timing', taken as a whole the brochure suggests that accumulation in order to "spike" the final year of compensation that is used for benefits determination is allowed. Indeed the brochure appears to encourage employees to do so. ("Making the Most of Your Benefit", pp 16-17.) Most significant is page 18 of the brochure that cautions new employees that only vacation that they "sell back" will go into the pension calculation if it is "both earned *and* cashable" within the final compensation period. Surely this implies to legacy employees that spiking is still an encouraged benefit.

Based upon this material this Court concludes that there is strong evidence of the existence of an implied contract as to inclusion of 'cash-outs' of leave time earned outside of the final compensation period when paid in the final period or at termination. For reasons set forth below, however, a deeper analysis of the facts appears unnecessary.

Alameda County

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

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

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

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

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

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

It is unclear from the briefing whether counsel for Alameda County Members contends that an implied agreement applies as to including in "final compensation" leave earned outside of the final compensation period. In the Declaration of Rudy Gonzalez, submitted in support, he states "On information and belief, since 1999 ACERA has published and distributed to members of Local 856 numerous newsletters and Retirement Benefit Handbooks for the purpose of providing members with information about how their pension benefits would be calculated, and to assist members in their retirement planning. The only evidence attached to demonstrate that statement is Exhibit E to the Declaration, a newsletter from the Fall or Winter of 2010. The provisions of that newsletter, however, would appear to bar the claim of an implied agreement to allow spiking by use of multiple years of leave, it specifically stating at page 2:

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

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

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

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

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

spike, ‘final compensation’.

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

Merced County

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

> “include within compensation earnable amounts pertaining to members accrued vacation and holiday leave in their final compensation period …a maximum of 160 hours of annual leave, a maximum of one year’s annual leave accrual, or the number of annual leave hours actually included in the Member’s vacation payoff, whichever is less.”

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

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

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

parties agree that pay codes 354 and 393 are properly included because the compensation provided "may be earned" and is "payable" within the final compensation period (and therefore is not 'termination pay'). The Merced petitioners appear to agree that pay code 350 is 'termination pay' but contend that the judgment in the earlier Merced litigation creates at least an implied contract for inclusion.

Legality of any Implied Contracts

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

a."earned" compensation.

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

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

> " 'Compensation earnable' by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the

> 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

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

This ordinary meaning of the final sentence of § 31461 is consistent with the usual and normal expectations of our society regarding employee pensions. As employees age our populous recognizes the need for that person to continue with a standard of living at or reasonably close to that while working but recognizes that it is no longer necessary for the retiree to be building a healthy nest. And yet if this Court were to adopt the position of the petitioners that the Legislature intended that pensions could be adjusted upward by compiling leave time accumulated and

including it as the average compensation in his or her "final compensation" computation period, the possibility of a pension greater than what the employee was regularly earning would result. This Court finds no evidence that the Legislature had such an intention. At least one appellate court has addressed the deviation from statutory intent that such distortion would allow. Hudson v. Board of Administration of the Public Employees' Retirement System (1997) 59 Cal.app.4th 1310, 1321-3.

Even were § 31461 ambiguous, little if any support can be found for the petitioners' proposition that the final sentence of § 31461 was intended by the Legislature solely for only a narrowly defined purpose. The proposal of petitioners that "compensation that has been deferred" was intended to only refer to monies put aside in a tax saving plan, such as a 401K plan, is found in In re Retirement Cases (2003) 110 Cal.App.4th 426, 475, based upon a comment by Judge Pollak that "on its face" the sentence might apply to payments made to a deferred compensation plan. Both Judge Pollak and the Court of Appeal, however, disregarded that comment by finding that for the issue before that court § 31461 has no application. It is the view of this Court that such *dicta* misses the main point; the words of the Legislature are to be given their ordinary meaning. The 'deferred compensation plan' theory fails, in the view of this Court, because under no set of tax laws that exists today, or has existed in the relevant time, was an employee allowed to deduct from his or her taxable income an amount of compensation placed into a tax-deferred compensation plan that was earned in a different year than the year of the tax return. Thus, the existence of the possibility referred to by petitioners that the Legislature intended only to refer to

this type of "deferred compensation" is not feasible.

More importantly, the determination of when compensation is "earnable", as applied to accrued leave time, does not depend upon the wording of that final sentence. Standing alone the other provisions of the section do not lead to the conclusion that the Legislature intended that employees could save up all of their leave time and add the value of that total in determining their 'average' compensation during the final compensation period.

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

In Ventura County Deputy Sheriffs' Association vs. Board of Retirement, *supra*, 16 Cal.4th 483, the California Supreme Court issued what is considered a landmark decision in the area of county government pensions. In overruling at least one Court of Appeal decision [7] the Court held that bonuses, incentives, and other forms of compensation, even if not received by all employees in a job classification, were "compensation earnable". There can be no dispute that following the issuance of that opinion a great number of retirement boards were challenged for having followed the Guelfi narrow definition of "compensation earnable" resulting in a

7 Guelfi v. Marin County Employees' Retirement Association (1983) 145 Cal.App.3d 297.

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

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

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

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

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

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

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

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

same distortion. [8]

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

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

The position of the petitioners on this point is troublesome; they seem to be of the view that retirement boards are highly restricted unless making a determination

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8 The Salus court made reference to the comparison of CERL provisions to PERS requirements. Both sides address that issue here but it is not relevant in that there is no need in analyzing PERS to determine when leave is includable because under the applicable provisions state employees cannot include any unused leave in the calculation of their final compensation.

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Earned and "Payable".

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

The holdings of these opinions were not only clear and unambiguous, but were the subject of discussion at proceedings of the respective retirement boards. For instance, at a meeting of the Board of Retirement for Contra Costa County on March 10, 2010 (Exhibit L to the Joint Stipulation of Facts) counsel reminded the Board that pay items that are "only payable after termination" my not be included in "final compensation". Counsel also clarified the respective roles:

”employers and employees determine what items of compensation are to be received during service; the retirement board determines which of those items should be counted in calculating retirement allowances”.

AB 197 incorporates this prior law as section 31461 (b) (4) excludes “payments made at the termination of employment, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid” (emphasis added). A clear distinction was therefore drawn between “payable” and “paid”. Accordingly, an employer and employee may agree generally (but not for a purpose of ‘enhancement’) that vacation not used may only be cashed out as the employee winds up and prepares to terminate the employment, but that the employee has the option of taking the funds during or after the final compensation year. Such a situation is not “termination pay”. The law has been and remains, however, that to be included in ‘final compensation’ the cash-out of accumulated leave must have been payable in the final period, i.e. the employee had to have the right to “sell” (i.e. create the monetary obligation for “cash out”) the accumulated leave prior to the end of his or her employment.

c. Invalid Contracts.

The Court concludes that the Attorney General’s analysis of the issue as to whether an employee can be vested in the promises contained in a contract that is invalid is correct. In Medina v. Board of Retirement (2003) 112 Cal.App.4th 864 the court stated:

“The contract clause does not protect expectations that are based upon

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

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

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

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

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

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

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

Equitable Estoppel

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

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

Administration, Public Employees Retirement System, et al (1973) 32 Cal.App.3d 567, 581:

> "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts, and (4) he must rely upon the conduct to his injury".
>
> [citing Driscoll v.City of Los Angeles ( ) 67 Cal.2d 297, 305]

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

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

While one can postulate that everyone is presumed to know "the law", in

reality the pension laws are at such a level of complexity that Members would not know, when advised by the boards to the contrary, that monies received in their final compensation period were not includable in their pension calculations because the leave time accrued in an earlier period.

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

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

and the value of receiving that value in the employee's pension years.

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

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

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

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

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

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

The decision in Longshore v. County of Ventura (1979) 25 Cal.3d 14, relied upon by the Attorney General, is not in opposition to the Mansell approach. The

Court there appears to follow the balancing methodology but simply comes to an opposite result, concluding that the estoppel would be contrary to "clear constitutional policy". For a more relevant analysis of equitable estoppel principles see City of Oakland v. Oakland Police and Fire Retirement System (Opinion issued February 28, 2014, First District Court of Appeal case A136769, reported at 2014 Cal.App.Lexis 192).

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

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

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

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

Accordingly, a Writ of Mandate regarding this subject is appropriate but only applicable as to the single class of legacy employees entitled to apply the doctrine of equitable estoppel by being injured in the manner described. Specifically, the doctrine of equitable estoppel will not apply to members that merely had the expectation of carrying vacation or other leave time forward and cashing it out in their final compensation period. Only those who meet the following requirements are entitled to the benefit of a Writ of Mandate as to “earnable” and “payable” requirements on the basis of equitable estoppel:

a. Prior to AB 197 the applicable employer allowed, during employment, a cash out of unused leave time in amounts in excess of the amount of leave time earned in the selected final period;

b. As of December 31, 2012, the employee had accrued and not used one or

more types of such leave time in an amount or amounts in excess of that allowed for one year (or 3 years if the employee position uses an averaged 3 year final compensation period);

c. The employee had not used or cashed-out such accumulated leave time prior to the commencement of the employee's final compensation period; and

d. The employee elects during the final compensation period to cash-out some or all of his or her balance of such leave time.

e. The amount or "carried over" leave time to be included in 'final compensation' shall not exceed the lesser of (1) the amount of leave available on December 31, 2012, or (2) the amount cashed out in the final 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:
> ….
> (3) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise".

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

In various briefings the members have contended that compensation that is paid for "on-call", "standby", or "call back" time has, until the respective retirement boards changed their positions based upon the enactment of AB 197, been included in final compensation.[9] One thing that is clear is that the wording "outside of normal

9 The Court assumes that there is no "timing" issue with these items, i.e. that these items have not historically been 'accumulated' or 'banked' but are items both earned and payable during the final

working hours" was not included in the CERL provisions previously. The state contends that this language is merely "clarification" and that the provisions for 'compensation earnable' that referred to "average number of days ordinarily worked" was equivalent.

Prior to AB 197 there appears to have existed no appellate authority that addressed whether payment to an employee that has regular working hours but is also compensated, by agreement with the employer, for time "on-call" to return when needed would be included in 'final compensation'. In the view of this Court § 31461 has contained an ambiguity as to this type of compensation, at least in circumstances where the responsibility is regularly required, such as is shown by the Declaration of Rocky Medeiros filed on January 27, 2014.

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

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compensation period.

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

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

Since a change has occurred in the practices of the respective boards in dealing with “on call” type compensation, the issue of whether or not legacy employees have become “vested” in the prior practice will depend upon the question of whether, for each particular circumstance, the practice was allowable, i.e. in conformance with the requirement that it be within the inclusion of “days ordinarily worked”.

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

period and excluding such things as “swapped” time from another employee.

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

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

The burden lies with the petitioner seeking a Writ of Mandate that limits the action of a government agency on the basis that such action would violate a constitutional right of the petitioner. This requires the petitioner to establish (1) that the petitioner has a specific right, (2) that action by the government agency has been

undertaken or threatened that would interfere with that right, and (3) that the petitioner will be injured by the taking of the threatened action. Petitioners have not met this burden with respect to any other compensation that is now required to be excluded by §31461 (b) (3).

Compensation Paid to Enhance a Pension

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

> "(A) Compensation that had previously been provided in kind to the member by the employer or paid directly by the employer to a third party other than the retirement system for the benefit of the member, and which was converted to and received by the member in the form of a cash payment in the final average salary period.
> "(B) Any one-time or ad hoc payment made to a member, but not to all similarly situated members in the member's grade or class.
> "(C) Any payment that is made solely due to the termination of the member's employment, but is received by the member while employed, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period regardless of when reported or paid."

In response to this new requirement, at least one of the retirement boards has changed its policy on certain pay codes that appear to be "one time" payments, or the like, to indicate that they will be excluded from 'final compensation'. The petitioners object to this "categorical" exclusion, urging that it fails to use the procedure which is required by Government Code §31542. It appears, however, that the respective

boards have adopted administrative procedures which meet the requirements of §31542 (see for instance the ACERA action of March 21,2013, Exhibits B and C to the Request for Judicial Notice filed February 6, 2014). The Court proposes to deny writ relief upon this aspect of the petitions "without prejudice" and allow implementation of the new code requirements to proceed with minor adjustments made if found necessary by the parties.

A review of the settlements that occurred after the Ventura opinion was issued shows that it was and is generally accepted between those that negotiate pension provisions and the retirement boards that unusual payments do not qualify as "average" compensation as defined in subsection (a) of Section 31461. Accordingly it appears to be pure speculation that, with the three retirement boards that are before this Court, any practice that has been in effect beyond those otherwise covered by subsections (2), (3) and (4) of the new subsection (b) will fall within the parameters of subsection (1). It is essential to note that the subsection does not mandate exclusion of these items, it only states that compensation created to enhance may be suspect. Significantly, however, it is doubtful that if a practice of including special 'one-time' payments made in the final compensation period existed prior to AB 197 any member could claim to be 'vested' in such a practice when it is purely conjecture that the member would be one of those persons that is granted such a payment.

Conclusion

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

A hearing will be held on April 25, 2014, at 10:00 a.m. (courtroom to be announced) to determine the wording of the final orders for the issuance of writs of mandate (separate for each county) in accordance with the foregoing decision.

Dated: March 18, 2014

Judge of the Superior Court

EXHIBIT A

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.