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SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA
BEFORE THE HONORABLE DAVID B. FLINN
DEPARTMENT NO. 6

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CONTRA COSTA COUNTY DEPUTY)
SHERIFFS ASSOCIATION; UNITED)
PROFESSIONAL FIRE FIGHTERS)
OF CONTRA COSTA COUNTY,)
LOCAL 1230; KEN WESTERMANN;) NO. MSN12-1870
SEAN FAWELL,)
Petitioners,)

vs.

CONTRA COSTA COUNTY)
EMPLOYEES' RETIREMENT)
ASSOCIATION; BOARD OF)
RETIREMENT OF THE CONTRA)
COSTA COUNTY EMPLOYEES')
RETIREMENT ASSOCIATION; et)
al,)
Respondents.)

AND RELATED PETITIONS IN)
INTERVENTION)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

November 19, 2013

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Taken by: RAJAHNIQUE JONES
Certified Shorthand Reporter
License No. 13457
State of California

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A P P E A R A N C E S

For the Petitioners:

ARTHUR LIOU
Attorney at Law
LEONARD CARDER, LLP
1330 Broadway, Suite 1450
Oakland, California 94612

ROCKNE A. LUCIA, JR.
Attorney at Law
RAINS LUCIA STERN, PC
2300 Contra Costa Boulevard
Suite 500
Pleasant Hill, California 94523

For the Respondents:

HARVEY L. LEIDERMAN
KERRY K. GALUSHA
Attorneys at Law
REED SMITH, LLP
101 Second Street, Suite 1800
San Francisco, California 94105

For the State:

ANTHONY P. O'BRIEN
Attorney at Law
OFFICE OF THE ATTORNEY GENERAL
1300 I Street, Suite 1101
Sacramento, California 94244

For Merced County Employees' Retirement Association:

MICHAEL P. CALABRESE
Attorney at Law
MERCED COUNTY
2222 M. Street, Room 309
Merced, California 95340

For San Ramon Valley Firefighters, Local 3546; Contra
Costa County District Attorney:

CAROL L. KOENIG
Attorney at Law
WYLIE, McBRIDE, PLATTEN & RENNER
2125 Canoas Garden Avenue, Suite 120
San Jose, California 95125



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A P P E A R A N C E S (continued)

For Contra Costa County; Contra Costa County Fire Protection District; LAFCO; IHSS; First Five Children & Families; CMN:

MARY ANN McNETT MASON
Attorney at Law
COUNTY OF CONTRA COSTA
651 Pine Street, 9th Floor
Martinez, California 94553

For Contra Costa Sanitary District:

LINDA M. ROSS
Attorney at Law
MEYERS NAVE
555 12th Street, Suite 1500
Oakland, California 94607

For United Professional Firefighters of Contra Costa, Local 1230:

W. DAVID HOLSBERRY
Attorney at Law
McCRACKEN, STEMERMAN & HOLSBERRY
595 Market Street, Suite 1400
San Francisco, California 94105

For SEIU, Local 1021, Building Trades Council of Alameda County:

ANNE I. YEN
Attorney at Law
WEINBERG, ROGER & ROSENFELD
1001 Marina Village Parkway, Suite 200
Alameda, California 94501

--oOo--



1 November 19, 2013

9:31 a.m.

2

PROCEEDINGS

3

THE COURT: We're here on a number of matters.

4

We're here for case management and to set the briefing

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schedule for the next hearing, which is the main

6

reason, I guess, we're here.

7

We have before us, which I've continued to today,

8

a motion by the Contra Costa and Alameda boards to

9

modify the stay. Maybe we should get the scheduling

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out of the way and then as we talk we'll know where we

11

are and whatever.

12

I indicated to everybody that in my view it's

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important that this case be given priority at this

14

point. There's people out there that this means

15

things to in terms of their life planning and

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retiring. In that sense, I just think to drag it out

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a long time would not be right, and so I set -- what

18

did we set? -- December 10th is our argument?

19

MR. LEIDERMAN: Yes, your Honor.

20

THE COURT: I suspect people have started looking

21

at vesting and started looking at the issues that are

22

raised by that, so with that in mind, there's several

23

ways to go about the briefing. One possibility is --

24

to get everything out as effectively and quickly as

25

possible -- is to have simultaneous briefing by all

26

parties, all the parties that have had the lead roles,

27

and then set a date for people to file their own --

28

some counties -- Merced has some things that might be

1 different to raise and so on, but -- so simultaneous
2 briefing and then a second brief. At least that would
3 get us down to two dates rather than three dates.
4 Traditional briefing, of course, you have the opening,
5 opposition, and then the reply, which makes it three
6 dates.

7 Mr. O'Brien, let me ask you, since you normally
8 would be the replying brief, how do you feel about
9 doing a simultaneous vesting brief or do you need to
10 see their --

11 MR. O'BRIEN: Well, we actually had a case
12 man- -- a meet and confer with respondents and leading
13 petitioners' counsel on Friday. Our preference would
14 be to have the opportunity to respond. However, the
15 petitioner mentioned given the tight time frame we
16 have that would not be possible and still have it --
17 have the hearing by the 10th. Our preference would be
18 to have -- keep the hearing on the 10th. If that
19 means we do simultaneous briefing to ensure that
20 hearing on the 10th, so be it.

21 I think your idea, though, of perhaps having
22 simultaneous briefing but an opportunity for a second
23 brief --

24 THE COURT: Well, there will have to be a second
25 brief if they're simultaneous because you won't know
26 what the other side is going to say.

27 MR. O'BRIEN: Right. If there's a second brief,
28 we'd ask that we get the opportunity in addition to

1 amicus to argue whatever's been argued by opposing
2 counsel. I assume they would want to do the same with
3 us.

4 THE COURT: Sure.

5 MR. LIOU: Your Honor, I think one question
6 that's raised for us is, sort of, the scope of the
7 hearing and the briefing we're looking at on the 10th,
8 whether we're dealing with all of the pay codes at
9 issue or really only talking about what you described
10 as the timing payments. Because I think if we're
11 looking at other pay codes --

12 THE COURT: Let me respond with a question on
13 that. At the first phase I looked at it and I kept
14 looking for someone to say there's this particular pay
15 code. The problem is not timing; the problem is
16 something else, and we think they've been doing it
17 wrong or we think we're doing it right and that
18 they're vested with that right.

19 I mean, the more I look at it, I have trouble
20 seeing that there's anything that -- if I said to the
21 original petitioner -- if I said to the original
22 petitioner, Give me a draft writ of mandate on the
23 issues other than timing, which I've addressed, I
24 don't know what you'd put. I mean, you know, I guess
25 you could say that anybody that had any -- any single
26 pay code that's out there before January 1st gets to
27 include that if they retire 30 years from now, or
28 whatever. You know, you can say that. And then the

1 State would have to say in response one by one what's
2 right and what's wrong.

3 I mean, the legislature didn't seem to be
4 really -- address much other than -- Ventura is still
5 there, so -- the legislature seemed to just address
6 timing almost exclusively with the one exception, and
7 that is this new hybrid that we've talked about of
8 getting to the state of mind. You know, what was the
9 purpose of the thing. But there's not a lot of
10 history anybody has recited so far to me of a lump sum
11 last year payment to somebody just ad hoc. Ad hoc's
12 in that statement. I mean, we can't be Don Quixote
13 here. We can't just be guessing at --

14 MR. LUCIA: Your Honor, if I may.

15 THE COURT: So what -- just an example.

16 MR. LUCIA: I think that when we filed the action
17 we were very focused, very specific on responding to
18 the actions taken by CCCERA and the retirement board
19 and what they considered to be items that applied to
20 the DSA and to the fire fighters, those items not
21 being included in the pension calculation. So we were
22 not casting a wide net.

23 I think that we were pretty focused on what we
24 were targeting. And what we were asking for was
25 simply adjudication that the folks who have been hired
26 on or before the effective date of AB 197 be allowed
27 to include those items that the CCCERA board had
28 determined should not be or would not be included. So

1 I don't know about --

2 THE COURT: Did they include -- when they did
3 that, did they -- refresh my memory. Did they include
4 any matters that were not timing?

5 MR. LUCIA: I'm going to defer to Mr. Leiderman
6 on that.

7 MR. LEIDERMAN: I could give a couple of examples
8 that are excluded under AB 197. So -- they're not
9 timing issues. One of them is time beyond normal
10 working hours. Okay. Sometimes referred to in --
11 since there are pay codes for being on call. That's
12 when someone is beyond their normal working hours.

13 THE COURT: But those all fall in Subsection 1,
14 don't they?

15 MR. LEIDERMAN: No.

16 THE COURT: Then I read it wrong.

17 MR. LEIDERMAN: No. That's in (C) -- I don't
18 have it at the top of my head. I don't have the --
19 here it is.

20 MR. LIOU: That's (B) (3).

21 MR. LEIDERMAN: Yeah. (C) (3). So the pay codes
22 that were approved in Contra Costa said that on call
23 that was regularly scheduled for everybody in a
24 department --

25 THE COURT: That refreshes my memory.

26 MR. LEIDERMAN: -- was permitted, but on call
27 that was not regularly scheduled was considered
28 overtime not permitted to be pensionable. AB 197

1 appears to not make that distinction and make all on
2 call after regular working hours to be
3 non-pensionable. So that's one issue where the pay
4 codes specifically -- that is raised not in the DSA
5 complaint, but in other petitioners' complaint in
6 Contra Costa County.

7 THE COURT: Yeah. That refreshes my
8 recollection.

9 MR. LEIDERMAN: The other --

10 THE COURT: That item is there.

11 MR. LEIDERMAN: The other subsection under AB 197
12 that is now excluded that was previously included by
13 both Contra Costa and Alameda County boards were
14 these -- were any one-time bonuses, one time ad hoc
15 payments. I think we talked to the Court using the
16 example at the last hearing on somebody in their last
17 year getting a bonus for loyalty or something like
18 that, a retirement bonus.

19 THE COURT: That does fall in Category 1.

20 MR. LEIDERMAN: And that --

21 THE COURT: That's the --

22 MR. LEIDERMAN: That also falls under (C). I
23 don't have it in front of me. I'm sorry, your Honor.
24 I don't have the code section, but it's the one time
25 only.

26 THE COURT: Maybe it could be considered to be
27 under (C) (4).

28 MR. LEIDERMAN: Correct.

1 THE COURT: A termination payment.

2 MR. LEIDERMAN: That's at termination. But it
3 would be -- well, okay. That's at 1(C).

4 THE COURT: See, that's what I thought.

5 MR. LEIDERMAN: That's a 1(C) item, discretionary
6 item, but I thought there was also --

7 MR. LIOU: There's also 1(B).

8 MR. LEIDERMAN: 1(B), any one time or ad hoc
9 payments. Exactly.

10 So there are, you know, the on call, the after
11 hours -- after normal working hours is probably -- is
12 the one that is specifically teed up by the pleadings
13 in this case, that is pled.

14 THE COURT: Yeah. I recall when you mentioned
15 that.

16 MR. LEIDERMAN: So that's an example of --

17 THE COURT: Maybe this is a situation where what
18 we should be doing is severing the determinations. I
19 mean, these are very different issues, and maybe the
20 Court should make a determination in December --
21 because this is the bulk, I think, of people -- on
22 who's vested with -- if anybody -- with timing-type
23 matters, and reserve for further briefing, let's say
24 in January, of beyond normal working hours and the ad
25 hoc issues. And -- I mean, one could issue two
26 separate writs of mandate.

27 MR. O'BRIEN: One point, your Honor.

28 THE COURT: The appellate process gets a little

1 muddied up.

2 MR. O'BRIEN: One point, your Honor. In, I
3 think, page 18 of your decision from ten days ago --

4 THE COURT: Yeah.

5 MR. O'BRIEN: -- I believe, you mention there
6 that -- you address the on-call hours, and you note
7 that -- the Court notes that the -- this AB 197 does
8 not appear to state a change in the law. You say the
9 clear intent -- the Court says, "The clear intent of
10 AB 197 would appear to this Court to be -- to simply
11 clarify the language that has existed in Section 31461
12 that the compensation calculation is to be based on
13 days ordinarily worked by persons."

14 The reason I bring this up is, you know, if the
15 Court is looking to divide up the final part -- the
16 vesting issue between timing and the other issues, we
17 think that the on call -- the question about on call
18 could still be addressed in the December decision
19 because, essentially, the question for December, I
20 anticipate, is, can the employees have a vested right
21 to the pay items if they're not authorized by the law.
22 And so the -- the -- the on-call hours would fit
23 within that question as, you know, it appears here.
24 The Court is saying that the State's determination
25 under AB 197 is consistent with the previous law that
26 did not authorize such on-call pay.

27 THE COURT: Well, I don't think I was intending
28 to state it in that manner. I was more of the view

1 that, A, they talked about the Salus case; but, B,
2 that the intention seemed to be -- I didn't find an
3 intention to deviate from Ventura. I didn't find one
4 not there, but, I mean, at least there's not a clear,
5 you know, statement in the legislation that seems to
6 say, Hey, you know, Ventura didn't go far enough or
7 get it right or this or that or the other.

8 And so the question of on call was, I guess, sort
9 of an open question following the Ventura because that
10 wasn't one of the items in the Ventura decision.
11 Everybody had to argue analogies as they moved down
12 the road with other pay codes, but I -- you know, my
13 traditional view is to let people tee up in their
14 briefing the issues they wish to tee up, and then
15 we'll hear from everybody in oral argument about what
16 the Court should do. I have no problem with including
17 at least the outside of normal hours in this phase.

18 MR. LUCIA: The only question I would pose --
19 because it doesn't really affect the DSA, and I'm not
20 sure if it affects the fire -- is the record. It's
21 not my issue, I don't think, generally, but the
22 question is the sufficiency of the record that the
23 lawyers would have to brief the issue and for the
24 Court to properly consider it.

25 You know, again, I'm speaking just for the
26 petitioners. We went to great lengths to create a
27 statement of facts. CCCERA agreed to those facts,
28 stipulated to it, but I think it only applies to our

1 particular issues. And so while I understand what the
2 Court is saying -- again, it's not my issue -- I just
3 wondered what the sufficiency of the record is to
4 properly brief those issues. More of a question.

5 THE COURT: Yeah. It's a good question because,
6 you know, none of us like to sit up here and make
7 decisions just in some hypothetical abstract without
8 any grounding in fact and without -- you know, it's a
9 lot easier for somebody to say, There was an
10 automobile accident. This guy was going 30 miles an
11 hour. This one ran a stop light, than having a case
12 where they come in and say, They crashed in the
13 intersection. Everybody was killed. Nobody knows
14 what happened. Judge, tell us who is right. You have
15 to have facts.

16 MR. LUCIA: Right. I think when we initially
17 came to you, filed the petition, I think the other
18 parties understood at some point they would have an
19 opportunity, as you said, to create a record. So,
20 again, while we've entered into the first -- Phase 1
21 of the proceedings and you've issued an order -- I
22 understand that we have a basis to argue the law. As
23 the Attorney General is asserting, But there's not a
24 right. We argue that there is. And Mr. Leiderman
25 will talk about the discretion granted to the
26 retirement boards. Going beyond that, I think, will
27 be problematic, in my humble and respectful opinion.
28 I just wonder what the impact of that will have, then,

1 on further proceedings in this court. I don't know
2 where we go after that.

3 THE COURT: That's true, but you don't miss from
4 that concept that the burden of proof doesn't lie with
5 the other parties. It lies with the petitioners.

6 MR. LUCIA: Right.

7 THE COURT: We can't be, you know, issuing a writ
8 of mandate on things we don't know.

9 MR. LUCIA: Again, I speak -- maybe I should
10 defer to other counsel. In terms of the record for
11 the firefighters and for the deputies, we have a
12 record sufficient, I think, to move forward.

13 THE COURT: For your --

14 MR. LUCIA: And that was an accomodation reached
15 with CCCERA when we first approached you. When we
16 first filed the answer, we knew we wanted to expedite
17 and we didn't want to have to go through discovery.
18 Then the cases came together, got more counsel, got
19 more issues, and now, you know, your Honor opened up
20 this morning talking about additional pay code items.

21 Mr. Leiderman has had this exchange with you
22 whether it fits into the box that we've now tried to
23 define for December 10th, and, again, I'm -- keep
24 raising an issue. I don't have an answer. From my
25 client's perspective, I think we do have a sufficient
26 record. I don't feel a burden, if you will, to do
27 anything more than argue the facts already in the
28 record.

1 THE COURT: Yeah. It was a little easier for me
2 to comprehend in the first briefing the types of leave
3 in the timing numbers and the economic effects of that
4 on things than it is on this outside of normal working
5 hours. It's still a little ambiguous to me.

6 MR. LUCIA: It's ambiguous because, I think --

7 THE COURT: I get the concept.

8 MR. LIOU: Right. Your Honor, we were briefing
9 the Phase 1 issues at an abstract level because we
10 were dealing with a legal question of authority --

11 THE COURT: We were --

12 MR. LIOU: -- in general. So since we didn't --
13 for instance, on-call pay is an issue for our clients,
14 and we haven't developed a record with regard to that.
15 And I think the other consideration here is, from my
16 point of view, having to coordinate briefing with all
17 of the petitioners and intervenors, it becomes more
18 difficult the more issues get added into that
19 briefing.

20 So if we are looking at December 10th for a
21 hearing, our preference would either be to limit that
22 to the timing issues or, otherwise, we would have to
23 ask that we extend this out so we can develop the
24 facts and confer with the other parties.

25 THE COURT: Mr. O'Brien, what's your view of --
26 that's sort of an indication that if we're not going
27 to just bounce the whole thing over longer, they would
28 prefer to do some severance here.

1 MR. O'BRIEN: Right. I guess, a couple things.
2 I mean, our interest would be to have as much decided
3 or have as much argued as we can by December 10th so
4 you can issue a decision shortly thereafter that is
5 substantive, that is something that can be put into
6 effect one way or another afterwards not reliant on
7 yet another decision down the road.

8 And as everyone knows, I mean, we're coming up on
9 the year anniversary of this case and the year
10 anniversary as well as the stay order in this matter.
11 And, likewise, there's similar stay orders that affect
12 Alameda and Merced. So our concern really is when --
13 at which point do we, you know, have a final
14 resolution that can lift either part or all of that
15 stay order.

16 So with respect to the need to develop more of a
17 record, whether it's in Contra Costa or the other
18 counties, again, these cases have been, you know, been
19 in litigation for a year. The State has not taken any
20 position to prevent any of the parties from developing
21 a record, so it's a little curious why it hasn't --
22 why the record isn't developed at this point. Why are
23 we waiting still when there's been an interest to try
24 to get this resolved?

25 And I think that there's still a primary question
26 here before records develop that, you know, can these
27 rights, these pension rights vest. Before we even get
28 into a determination as to which ones vest or don't

1 vest, we still need a ruling from the Court as to can
2 they vest at all. And I think that certainly is an
3 answer that can be -- a question that can be decided
4 at the December 10th hearing or the decision after the
5 December 10th hearing.

6 THE COURT: Well, let me comment to that. If we
7 did put aside -- let's say on-call time. If we did
8 put it aside, we still -- we would decide the vesting
9 question. I'm sure it's going to take me a long, long
10 time to get there. You know, I know that. But
11 ultimately I will declare my interpretation of law as
12 to vesting, and it's not going to change when we find
13 out some more facts, let's say, on on-call time or
14 what people have done, how they've done it, so forth,
15 and what they've been told by the boards. Whatever.
16 When we have all information, the legal concept of
17 vesting won't change. So it won't take a substantial,
18 monumental amount of work to apply the vesting
19 conclusions to the factual situation.

20 MR. LEIDERMAN: Your Honor, that was --

21 THE COURT: When I say "later," I don't mind
22 setting it, let's say, a week later. It can't be
23 quite a week. Something in there.

24 MR. LEIDERMAN: During our meet and confer
25 conversation about today's session, we tended to
26 coalesce around an approach that tees off of the first
27 case management order. The Court teed up two legal
28 issues. One, did the board have authority, and the

1 Court has answered that. And the second -- the second
2 question was, even if there wasn't authority, could
3 rights still be vested. Those were two legal issues.
4 We actually all thought, I think, that that should be
5 the topic. That second question of Phase 1 should be
6 the topic for the December 10th hearing.

7 THE COURT: I join you.

8 MR. LEIDERMAN: We can proceed with that.

9 THE COURT: I came with that state of mind to.

10 MR. LEIDERMAN: Any party can put in whatever
11 evidentiary support they wish to frame that legal
12 issue for the Court based on the record whatever -- a
13 set of stipulated facts is simply no more or no less
14 than that. It's just that we believe these events
15 happened in the -- at the time. And when they're in
16 the record, it's all public body action and
17 resolutions and that sort of thing. So there's no
18 dispute over most of the evidence that would be
19 relevant to that question, so I think a record could
20 be teed up on December 10th quite easily for that
21 legal issue.

22 If the Court determines at the end of that legal
23 issue, could they still be vested even if the boards
24 didn't have authority, then that -- if the Court says,
25 No -- if you didn't have the authority as ultra vires,
26 you can't have -- there's no vested right to an ultra
27 vires act, then it doesn't matter what comes after
28 that. It's essentially over. If the Court says,

1 Well, it's still possible to invoke estoppel or
2 vesting or some kind of theory on behalf of certain
3 people or the whole class of people, then we would go
4 into the next phase, which is putting in the evidence
5 in terms of all the issues that would be teed up:
6 Consent, reliance, representation, that sort of thing.
7 That would be for another day.

8 So I think that's how we were -- we were
9 anticipating that the Court wanted to proceed which
10 was to answer that second legal issue of Phase 1 at
11 the December 10th hearing. And --

12 THE COURT: Well --

13 MR. LEIDERMAN: -- in that regard, there's no
14 constraint on evidence coming in.

15 THE COURT: I'm not sure I see it as narrowly as
16 that. I really do believe that after the
17 December 10th date I should be able to determine
18 whether to issue a writ or not and what its parameters
19 would be.

20 MR. LEIDERMAN: Well, in that case, the parties
21 can submit whatever evidence they want for the
22 December 10th hearing and the Court can rule on it.

23 THE COURT: Yeah. I think we just -- we'll set
24 this two-step briefing, simultaneous briefing
25 schedule. And, you know, I'm going to work with
26 everybody. I need everybody to do their best to get
27 everything on the plate they can get on the plate. If
28 there's some problem, we'll find a way to deal with

1 it. We live in a world today where, you know, if we
2 have to say on the 10th, Folks, I'm going to have to
3 see you back on the 12th, so be it.

4 MR. LEIDERMAN: Okay.

5 THE COURT: We need to move along. So how --
6 let's work backwards. I really need to -- the 10th is
7 on a Tuesday. I really need the second briefing by
8 Friday the 6th.

9 MR. O'BRIEN: Your Honor, perhaps -- if we do the
10 two-tiered briefing, perhaps the opening briefs can be
11 filed on the -- on the 3rd, December 3rd, with
12 the -- any responding or amicus briefs filed on Friday
13 the 6th.

14 THE COURT: Yeah. That works for me if -- I know
15 you have the holiday coming, so you'll -- the only
16 real question is, I guess, particularly for you
17 Mr. O'Brien, if you receive on the 3rd of December, on
18 a Tuesday, their brief, can you really adequately
19 respond by Friday?

20 MR. O'BRIEN: Well, we will do the best we can.
21 I think -- I, you know, there may be, to some extent,
22 try and anticipate some of their arguments in our
23 opening brief.

24 THE COURT: Yeah.

25 MR. O'BRIEN: I would say, perhaps, if we do the
26 3rd, you know, if we set a noon deadline for the 3rd.

27 THE COURT: How's that? Does that work for the
28 petitioners, noon on the 3rd and then 4:00 o'clock on

1 the 6th?

2 MR. LIOU: That would work for us, your Honor.

3 MR. O'BRIEN: That works for us as well, your
4 Honor.

5 THE COURT: Okay. Well, I guess the only other
6 order of business is this -- the motion to modify the
7 stay. And I -- the more I give it thought, the
8 concept under which I was willing to issue a -- the
9 two parties were agreeable to the stay, but I wasn't
10 sure that that was the answer.

11 The legislature certainly was trying to save the
12 counties from going bankrupt, and so they passed this
13 legislation. And I sat and I said, you know, from the
14 facts that everybody presented in a common sense
15 situation, if I didn't stay, a whole bunch of people
16 were going to retire. And so all I've done is
17 postponed those people. If they have a vested right,
18 they can delay their retirement a bit. If they don't,
19 they're going to have to jump quick.

20 I'm not sure the economics to the counties
21 change -- or the agencies dramatically changes as long
22 as we get this done within a short time frame now. So
23 I'm not sure if modifying the stay -- you know, I've
24 expressed to you in public session my concern that
25 these boards have about how to apply the concept
26 that's in here about -- for the purpose of paid to
27 enhance. Well, you know, the things that have always
28 been legal in there are paid to enhance if they do,

1 you know. So it obviously means paid for, sort of, an
2 ad hoc purpose or something.

3 MR. LEIDERMAN: Correct.

4 THE COURT: I'm not sure the stay situation --
5 I'm inclined to leave the stay in place since we're
6 moving in a fast pace.

7 MR. LEIDERMAN: The reason we raised it, your
8 Honor, the stay has been outstanding for a year --

9 THE COURT: Yeah.

10 MR. LEIDERMAN: -- and there is some behavior --
11 individual behavior. Not pay code, entire categories
12 of behavior of in and out that we're talking about,
13 but individual behavior that appears on its face to be
14 solely intended to improperly increase final
15 compensation during that period on an ad hoc basis.

16 And for individuals who are making the decision
17 while the stay is in place to retire and we're under
18 an obligation to commence paying them their retirement
19 benefit, we feel that in those individual -- I'll call
20 them abuses. In those individual instances of abuses,
21 we would like to trigger the due process that the
22 legislature gave us.

23 It didn't just say, the board can unilaterally
24 make this decision and there's no due process. It
25 said in place under the new sections 31542, 42.5, a
26 process whereby the board can make -- staff can make
27 an initial determination that something is an outlier.
28 Somebody who suddenly -- in a department, for example,

1 not everybody serves standby or on call, but in this
2 last year for this one individual, an individual who
3 didn't take on call their whole career, suddenly signs
4 up in their last year for all of the on call for the
5 entire department for the year. You see this no on
6 call, no on call for years, and then in the last year
7 suddenly they're the only person in the department
8 that is on call.

9 THE COURT: It sounds like that would be a
10 decision the board might have made even before the
11 legislation.

12 MR. LEIDERMAN: We had no ability to look behind
13 and audit the records. This is just starting now
14 because we've been given this auditing tool to audit
15 the records, the pay records. And when we find it,
16 it's not like we can simply make that decision and
17 it's done. The legislature did the typical
18 administrative procedures-type due process provision
19 where the determination preliminarily is made, the
20 member can come in and contest it, there's a hearing
21 in front of the board, and then if they don't like
22 that, it goes into a normal writ. That's what
23 we're --

24 THE COURT: I will say -- I'll hear from the
25 petitioners. I am inclined to modify in that sense in
26 that I have no -- I can't conceive that that
27 particular person has a vested right. Because there
28 could be no expectation. If you never had on-call

1 time, you don't know there's even going to be any
2 available in the last year. So I don't see that as a
3 vested -- I'll tell you candidly, I simply don't
4 see an ad hoc payment -- let's call it an ad hoc
5 payment. I don't see anybody could be vested on an ad
6 hoc payment.

7 MR. LEIDERMAN: In a number of departments they
8 do know on call is available because they just -- it's
9 just naturally -- they say everybody in this
10 department has to be on call for some period of time
11 throughout a year. It's scheduled. Okay. However, a
12 single individual can substitute.

13 Your Honor, if you're in the department you would
14 say, you know what, I want to have vacation that week
15 or I have family coming in. I don't want to be on
16 call. Will somebody take it for me?

17 The pattern that we've discovered in some
18 instances is that it just so happens the guy who is
19 retiring that year is signing up for the whole
20 department's on call. We'd like to be able to --

21 THE COURT: We all know there's been some
22 reliance on some of that. We've had bailiffs in our
23 court system for years that will transfer their last
24 year from here to the jail, let's say, because they
25 can get more overtime. Not really because -- the
26 overtime changed because they outlawed overtime, so it
27 didn't do any good to do that. But back when I
28 started, we had some of this.

1 MR. LIOU: Your Honor --

2 MR. LEIDERMAN: So that's the tool. You know,
3 the legislature gave us that tool to exercise our
4 judgment and call those situations out on an
5 individual by individual retiree basis. Not on this
6 pay code that applies to everybody as in or out, but
7 an individual situation that appears to be an abuse or
8 a misreporting or mischaracterization of pension
9 ability.

10 We'd like to use the tool in the toolbox without
11 upsetting what's going on in the court at this time,
12 because those people are retiring right now. They're
13 not waiting for the end of the stay.

14 THE COURT: Right.

15 MR. LEIDERMAN: They're going out and they're
16 trying to pull the ladder up behind them on these
17 practices. We'd like to put an end to that.

18 MR. LIOU: Your Honor, from our point of view the
19 problem with CCCERA's motion is that under California
20 Vesting Law it isn't really dependent on how much
21 someone has an expectation or knowledge about the
22 particular way that someone's pension is going to be
23 calculated. What the cases say is that you have a
24 vested right --

25 THE COURT: Cases say lots of things, Counsel.
26 I've read them all. I think I've read them all. I'm
27 going to read them again when I get your briefs.
28 There's also the right to change pensions. There's

1 cases that say very clearly you can change pensions.
2 We have to deal with all that. I'm going to want some
3 very sophisticated argument on this. I see this as a
4 difficult question, but it's not a slam dunk. I want
5 you to understand that.

6 MR. LIOU: Sure. And there are cases that say
7 that pensions can be modified if there's a comparable
8 benefit that's --

9 THE COURT: And there's some that don't require a
10 comparable benefit. I'll send some signals where I'm
11 going. I'm not a patsy. You know, we're not going
12 there with this concept that somebody that might get
13 an ad hoc contribution from somebody 25 years from now
14 gets to get it. The legislature says, no, and I don't
15 see any vesting there. I'll tell you that just slam
16 dunk clear. Is there some vesting? Probably some. I
17 don't know. I have to --

18 MR. LIOU: Your Honor, I think --

19 THE COURT: -- look seriously at this. It's not
20 as -- sure. You can find language, as any good lawyer
21 can always find language in cases, but it's not --
22 it's not that.

23 MR. LIOU: Well, your Honor, I think the cases
24 don't say that there's a, sort of, incremental
25 vesting. They seem to treat it, essentially, as all
26 or none. And so --

27 THE COURT: Well, you may see it that way,
28 Counsel. The Court doesn't.

1 MR. LIOU: With regard to CCCERA's motion, our --
2 the petitioners' cases are premised on the idea that
3 our members have a vested right to the continued
4 inclusion of these pay items, and --

5 THE COURT: The petitioners came to the court and
6 asked me to approve a stay when they were talking
7 about concluding the case by April or May of this
8 year. That was the discussion at the time of the
9 stay. And then the parties all needed more briefing
10 time and record time and so forth, and it's become a
11 major concern. I think the board should properly --
12 now, how to word the modification, I don't know.

13 MR. LUCIA: Your Honor, may I be heard on this
14 issue?

15 THE COURT: Yes.

16 MR. LUCIA: First of all on your last point, a
17 lot has transpired since a year ago when we filed the
18 petition. The courtroom is now filled with many more
19 lawyers than we anticipated, many more parties. The
20 Attorney General is sitting before you. The Attorney
21 General has taken legal position on issues that were
22 never contemplated by the parties when we originally
23 filed the petition. The fact that we have a Phase 1
24 briefing on an issue never contemplated, I think, goes
25 to the issue of delay. I'm just going to call it
26 delay. The fact that we've got four different
27 counties in your courtroom as opposed to just Contra
28 Costa. The fact that we've had some legal challenges,

1 I think, accounts for much of the delay.

2 THE COURT: I'm not putting blame for the
3 delay -- don't misunderstand me. In no way am I
4 saying someone should be blamed for the delay. What
5 I'm saying is society needs this case to move along.
6 Society needs to do what the law requires it to do.

7 MR. LUCIA: I agree. And we're not advocating
8 for a position of delay. We're not. I mean, my
9 earlier comments about a record go to the heart of the
10 issue that, you know, you've said yourself, that this
11 may not be the last stop on -- for the train on this
12 case or parts of it.

13 THE COURT: Right.

14 MR. LUCIA: My concern, again, was for the
15 record. Now, the other issue is on this question of
16 abuses of which Mr. Leiderman speaks. There may be
17 abuses, and the abuses that he wants to correct -- and
18 I have to -- I'm not going to pretend to tell you I'm
19 familiar with the statute sections that he's referring
20 to. But if it's a creation of the legislation, part
21 of AB 197 or PEPRA, then I think it goes to Mr. Liou's
22 argument about whether or not there's a vested right.

23 In other words, if Mr. Leiderman wants to review
24 a pension benefit because of a new right that the
25 retirement board has because of PEPRA and AB 197, I
26 think it goes to the issue of vesting and whether or
27 not an individual employee had the right to go and
28 take on-call pay, sign up for on-call pay. I think it

1 goes to the issue Mr. Liou addressed.

2 So while I understand your Honor's inclinations,
3 your signals, but I think our position is united that
4 none of us in this room have ever said that AB 197
5 should not be applied prospectively. I don't think
6 any party has said that. I think what we're talking
7 about and the reason we're in your courtroom is, does
8 it apply to employees who were on the books as of
9 December 31, 2012.

10 THE COURT: We all know what the fight's about.
11 That's not -- that's not confusing. The question is
12 whether there's any reason to stay the abuse aspects,
13 which were never before us in discussion at the
14 beginning of this case.

15 MR. LUCIA: But that abuse, as it's been defined,
16 could, as Mr. Liou said, could be a vested right. I'm
17 not defending an abuse. By the very use of the term,
18 it raises a negative connotation. But Mr. Leiderman
19 is talking about a process where they could ferret out
20 abuses. Again -- Mr. Leiderman can correct me -- it
21 sounds like it's a new right, if you will, opportunity
22 that the retirement board has. Again, it goes to the
23 prospective application of AB 197.

24 No one is saying -- I don't think Mr. Liou is
25 saying, I'm not saying, that going forward if such
26 abuses occur to new employees that those abuses can be
27 corrected. What we're talking about is the PEPRA
28 classic employee.

1 THE COURT: Are we talking about six weeks?

2 MR. LEIDERMAN: Well, I don't know. I don't know
3 if it's six weeks. People tend to --

4 THE COURT: I'm not afraid to send signals. My
5 signal is I intend --

6 MR. LEIDERMAN: There's a couple of times a
7 year --

8 THE COURT: I think that, you know, we all have
9 to roll up our sleeves and get these legal issues to
10 resolve.

11 MR. LEIDERMAN: If the Court would prefer to tie
12 this up at the December 10th hearing, I suppose we can
13 wait that long. A couple of times a year are big
14 times for retirement. The end of the year and the
15 month right before the CPI announcement comes out and
16 COLA increases come into effect and people want to
17 qualify, so that's the end of March.

18 But the end of the year is a bump in retirements,
19 and we're going to be -- and have been dealing all
20 year now that we've been given this auditing tool to
21 get these records. And now we're finding out things
22 we didn't know before, and these people are retiring
23 because they're taking advantage of those things.

24 We're not trying to -- I would not suggest -- the
25 Court asked a question, How could I frame a
26 modification order? In the proposed order that we
27 submitted, it simply says that we can take the actions
28 the legislature gave us under (b) (1) in those

1 instances, and that's it. Not wholesale change the
2 board's policies from what they were until this Court
3 makes a final judgment on that. But we're not trying
4 to change our existing policies. We're trying to
5 ferret out abuses of those policies.

6 THE COURT: There's a legitimate request before
7 the Court about vesting. I may not agree with
8 Mr. Liou that somebody that was hired in the last --
9 two years ago can plan that, When I reach retirement
10 age there might be enough time out there that I can on
11 call, etcetera, etcetera. But that's not the issue
12 that you've raised because this isn't a 30-year or
13 25-year retiree. This is a person that -- and I would
14 assume the argument is going to be, This person has
15 changed his position. This person could have been out
16 fishing and instead of going fishing he -- you know,
17 this kid has -- you know, a child going to school in
18 England and would like to go visit but he needs -- he
19 made the move to do the on call time because it was
20 allowed. That person may be vested. I'm not saying
21 they are or not, but it's a more legitimate issue in
22 my mind that I think that the stay probably should
23 protect that person from the short-term.

24 MR. LUCIA: Absent --

25 MR. LEIDERMAN: Shall we continue this to the
26 December 10th hearing then, your Honor?

27 THE COURT: Right. We'll keep -- I believe the
28 stay had a provision that the Court could modify it.

1 MR. LEIDERMAN: It did.

2 THE COURT: But just the short-term, I want to be
3 sure everybody gets their day in court before I make a
4 decision that affects -- but my hypothetical of
5 25 years from now doesn't really apply to the people
6 in the next six weeks.

7 MR. LEIDERMAN: Correct.

8 THE COURT: Okay. That's what we'll do.

9 MR. O'BRIEN: Okay.

10 THE COURT: Okay. I look forward to my reading.
11 After I issued this preliminary thing, I got a weekend
12 off. It was nice.

13 MS. KOENIG: Carol Koenig representing Local 3546
14 and the district attorney -- assistant district
15 attorney. Just one clarification. A lot of our
16 clients are contacting us asking us if they should run
17 out and retire today or if there's going to be some
18 notice.

19 THE COURT: The stay has a 60-day clause in it.

20 MS. KOENIG: Then it would be 60 days. Okay. I
21 just wanted to clarify. So 60 days after ruling --
22 there will be notice of 60 days?

23 THE COURT: That was the purpose of the 60 days;
24 right?

25 MR. LUCIA: Correct, your Honor.

26 MS. KOENIG: Thank you.

27 THE COURT: Right. Now, you know, what will
28 happen if somebody decides that some retirement

1 calculation is wrong under prior law, that's not
2 before me. Now, you know, in the case management
3 order -- I don't like to duck things. In
4 Mr. Leiderman's conference statement he raised some
5 questions. It's not a good practice for the Court to
6 announce or clarify a written ruling that -- you
7 know, on the record for appeal, so I'm not going to do
8 that other than to say that I would hope you read in
9 there -- and maybe I didn't really say it. But it is
10 my view -- and I will share this part -- that the
11 employees actually gained one thing, I think. This is
12 a very close question, but I think the -- under
13 Justice Lambden's decision in the In re Retirement
14 cases, they held unequivocally that if it was not
15 collectable except on retirement that it wasn't
16 included.

17 My view is the legislature has flipped that. The
18 legislature in talking about termination payment in
19 Subsection (C)(4) says you're to exclude payments made
20 at the termination of employment, except those
21 payments that do not exceed what is earned and payable
22 in each 12-month period during the final average
23 salary period.

24 I read that as intention of the legislature to
25 let you -- and it makes sense. I mean, why should
26 there be a difference between somebody that can
27 collect it on Friday and somebody that can collect it
28 on Monday? Because it really is final year's pay. I

1 mean, you can go back to Ventura. Let's say it's a
2 meal allowance or something that Ventura held was
3 acceptable. If one of the counties happens to say,
4 Because of our budget we don't want to pay you as we
5 go along. We'll pay you each -- each year. You'll
6 have to take it in time, but the last year you can --
7 you'd get paid in termination. We're not talking a
8 large amount of money, I wouldn't think, there, but
9 that's a little different. But I think that language
10 has real meaning compared to In re. Now, Lambden gave
11 it a pretty short -- you have this long, long opinion
12 but two paragraphs about it, but --

13 MR. LEIDERMAN: Your Honor, if I may.

14 THE COURT: So the answer at least to one of your
15 hypotheticals, it seems to me -- I'm not sure that's
16 what's before me in the mandate proceedings.

17 MR. LEIDERMAN: The Court focused quite heavily
18 in the ruling on the timing issue of when something
19 was earned.

20 THE COURT: Earned. That's what the legislature
21 seemed to be intending.

22 MR. LEIDERMAN: What we didn't find in the
23 Court's order was the second prong, which was the
24 payable or cashable or receivable during service. And
25 that's what we deal with all the time, and that's what
26 those hypothetical examples were dealing with, which
27 is, if it was -- and you can read In re Retirement,
28 Justice Lambden's ruling, to say that it's only out if

1 it was never able to be received during cash in the
2 final year -- earned and received during cash in the
3 final year, but we didn't see the -- receive the
4 payable part in the Court's ruling.

5 So we're trying to apply -- to get some real
6 direction from the Court's order and to what this
7 means in the situations where someone has the right to
8 take it in cash before they retire but they just take
9 it in their termination check instead.

10 THE COURT: The distinction between the person in
11 the county that writes its MOU in a way that says you
12 can't get it --

13 MR. LEIDERMAN: Right.

14 THE COURT: -- except when you --

15 MR. LEIDERMAN: Yeah. Those two people are
16 different. Justice Lambden was saying, If it's only
17 receivable at termination, we consider it out. But we
18 didn't -- we didn't see the Court to have gone --

19 THE COURT: No, I have not -- I did not -- the
20 word's right there, earned and payable, but it seems
21 to me you have to use some common sense. If it's
22 earned, there's no way -- if -- it's hard to see a
23 reasonable mind drawing a distinction between the
24 Friday and the Monday, so I haven't issued a decision
25 one way or the other on that.

26 MR. LEIDERMAN: Okay.

27 THE COURT: Maybe we'll have to at the end of the
28 day; maybe not. We'll see. Basically I -- there's a

1 lot of complexity coming out of this. Straddles is a
2 serious question. Is "earned" the first day of the
3 year? Is "earned" the last day of the year? Is
4 "earned" prorated over the year? Probably logic tells
5 you it's prorated, but I didn't decide that. I'm just
6 thinking out loud with you.

7 MR. LEIDERMAN: And we were -- I'm trying to look
8 forward to the text of the writ and what it would
9 command the board to do.

10 THE COURT: We're going to have to --

11 MR. LEIDERMAN: That's why we Teed that up so it
12 would give us some color for the rest of the
13 proceedings.

14 THE COURT: All right. What it probably won't do
15 is list -- the writ probably won't list 55
16 hypotheticals, but we'll hear from everybody.

17 MR. LEIDERMAN: I think -- honestly, your Honor,
18 we're really narrowed down to half a dozen scenarios
19 that would give the boards direction on how to proceed
20 for current members. It's probably not 30 or 40 or
21 50. We're really talking about a half a dozen key
22 turning points in interpreting the statute that we've
23 been struggled with for 15 years.

24 MR. O'BRIEN: Your Honor, may I add, is this,
25 perhaps, something, you know -- probably loading a
26 number of things into the briefing, but is this
27 something that if the State or any other parties have
28 any thoughts on this issue, on the hypotheticals posed

1 by Harvey, is this something we should, you know,
2 brief as well?

3 THE COURT: No. I think that my plan is to issue
4 a decision similar to what I did in terms of scope,
5 and then based on that, we'll have to hammer out. But
6 I hope everybody will be ready to do that after I
7 issue a decision, kind of, forthwith. Not in February
8 or something.

9 MR. LEIDERMAN: Thank you, your Honor.

10 MR. O'BRIEN: Thank you, your Honor.

11 THE COURT: All right. We'll see you on
12 December 10th. Enjoy your brief writing.

13 MR. LUCIA: Thank you, your Honor.

14 MR. LIOU: Thank you, your Honor.

15 --o0o--

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17 (Whereupon, the proceedings were concluded at
18 10:25 a.m.)

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STATE OF CALIFORNIA)
) ss.
COUNTY OF CONTRA COSTA)

I, RAJAHNIQUE JONES, CSR, License No. 13457,
State of California, do certify:

That said proceedings were reported at the time
and place therein stated by me, a Certified Shorthand
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I further certify that I am not interested in
the outcome of said action, nor connected with, nor
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IN WITNESS WHEREOF, I have hereunto set
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RAJAHNIQUE JONES, CSR, License No. 13457
State of California.

