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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

ORANGE COUNTY ATTORNEYS ASSOCIATION, Petitioner, vs. COUNTY OF ORANGE; BOARD OF SUPERVISORS OF THE COUNTY OF ORANGE, Respondents.	Case No. 30-2013-00638110-CU-WM-CJC **PETITIONER'S SUPPLEMENTAL BRIEF IN OPPOSITION TO AMICUS CURIAE BRIEF BY THE STATE OF CALIFORNIA** **Date: May 30, 2014** **Time: 1:30 p.m.** **Dept.: C25** **Judge: Hon. Thierry P. Colaw**

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I. Introduction

Despite seeking to file an *amicus curiae* brief for the stated purpose solely of defending the constitutionality of Government Code Section 31631 [Stipulation to Grant State of California Leave to File Amicus Brief, ¶¶ 3-4], the State in its brief does not actually defend the constitutionality of Section 31631. Instead the State contends that its brief represents an effort to "assist the Court in construing the statute" and then proceeds to argue that the Court should give a tortured reading to the statutory language. Only briefly does the State address what it refers to repeatedly as a "*potential* constitutional conflict." [Amicus Curiae Brief of the State of California ("Amicus Brief"), at 1, 2, 11 (emphasis added)].

Petitioner Orange County Attorneys Association (the Association or OCAA), is seeking that this Court issue a writ of mandate to enforce Gov. Code § 31631 based on three different aspects of the pension contributions which were unilaterally imposed by Respondents: (1) the County's ceasing its practice (commenced in exchange for a raise that OCAA agreed to forego) of the employer picking up a portion of the employees' pension contributions; – as well as the employees paying two elements of the *employer's* contributions which Respondents also imposed – (2) the contribution to cover past service liability; and (3) a portion of the employer's normal contribution representing the employer's cost of the 2.7% at 55 retirement formula. [Memorandum of Points and Authorities in Support of Verified Petition for Writ of Mandate, at 7-9.] The State concedes that with respect to the issue of the imposition by the County of Orange and the Board of Supervisors (Respondents) on the attorneys bargaining unit of the obligation to pay a portion of the employer's normal contributions that the position of the Petitioner, OCAA, is correct, ie., such action is prohibited by 31631(a). [Amicus Brief, at 7.] Thus, it appears that as to aspects #2 and #3 of the imposed pension contribution obligations, the State is in agreement with OCAA's position regarding Section 31631's prohibiting the employer in the absence of an MOU of taking the action of placing the obligation to make those portions of the employer contributions onto the attorneys.

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Indeed the State posits that there is not even a "potential constitutional conflict" "triggered" by an interpretation of 31631(a)'s requirement of an MOU applying to an employer's requiring that employees pay any portion of the employer's contribution. [Amicus Brief, fnte 9, at 11.] However, the State does argue that Section 31631(b) should somehow be read to allow unilateral action by the County to impose the obligation to pay the previously paid employee contributions, or in other words to cease the pick-up of employee contributions, in what is essentially a rehash of the County's previously made unconvincing arguments that the statute does not mean what it says and that the plain meaning of the Section's words is somehow inconsistent with the asserted "central purpose" of PEPRA.

II. Discussion

A. The Plain Language of Section 31631 Prohibits the Unilateral Removal of the Pick-Ups

Like Respondents' brief, the State, rather than grappling with a key phrase in Section 31631(a) also ignores the statute's language providing —"Notwithstanding any other law . . . ." This initial language of the statute is a term of art expressing the legislative intent "to have the specific statute control despite the existence of other law which might otherwise govern." *People v. DeLaCruz* (1993) 20 Cal.App.4th 955, 963. When coupled with the Section's clear, mandatory language,[1] it is manifest that, under Section 31631(a), the "require[ment] that members pay ***all or part of the contributions of a member or employer, or both***, for any retirement benefits" for existing represented employees must be embodied in an agreement between the board of supervisors and the employee organization representing those employees. *See* Gov. Code § 31631 (emphasis added). And, under settled principles of

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[1] Section 31631(a) provides, in relevant part:

> ***Notwithstanding any other law***, a board of supervisors or the governing body of a district may . . . without a change in benefits, require that members pay ***all or part of the contributions of a member or employer, or both***, for any retirement benefits provided under this chapter. All of those payments are hereby designated as employee contributions. For members who are represented in a bargaining unit, the payment requirement ***shall be approved in a memorandum of understanding*** executed by the board of supervisors or the governing body of a district and the employee collective bargaining representative.

§ 31631 (emphasis added).

construction, a statute should be interpreted in accordance with its unambiguous plain meaning. *People v. Woodhead* (1987) 43 Cal.3d 1002.

Indeed, as previously observed, the State concedes that under Section 31631(a) "attempts to require employees to pay *more than* their normal contributions must have employee agreement in the form of a MOU." [Amicus Brief, at 7 (emphasis in original).] However, the *amicus* brief contends that the Court should, nevertheless, allow such a change in the absence of an MOU with respect to the unilateral change made in the County's pick-up of employee contributions because Section 31631(b) supposedly preserves a right to make such unilateral changes pursuant to Section 31581.2 and 31581.1. This latter contention does not withstand scrutiny.

First, subsection (b) deals with something different from subsection (a), as is indicated by the use of different terminology ((a) refers to "employee contributions" while (b) refers to "member contributions"). Second, interpreting subsection (b) to allow unilateral removal of pickups would render meaningless subsection (a)'s provision that government employers may only "require that members pay all or part of the contributions of a member . . ." in the context of an MOU. Third, the very next section of the Code, Section 31631.5, suggests that subsection (b) does not refer to the right to unilaterally increase employee payments. Thus, although Section 31631(b) and Section 31631.5(b) are worded identically, Section 31631.5(a) replaces Section 31631(a)'s MOU requirement with an express authorization of unilaterally imposed increases (up to 50 percent of the normal cost of benefits starting in 2018); if the language in subsection (b) of 31631 were sufficient to allow unilateral imposition, there would be no need for the express reference to impasse procedures in Section 31631.5(a).

The State's reliance on the absence of the phrase "normal contributions" in Section 31631(b) to support its reading of that subsection is misplaced.[2] The State asserts that because Gov. Code § 20516(b) uses the term "normal contributions" and Section 31631(b) does not, the authority to change "member contributions" in Section 31631(b) must be broader than the "authority to adjust the amount actuarially set as the required employee contribution." This argument is belied by the fact that neither CERL nor PEPRA is consistent in describing the actuarially-determined contribution as the "normal" contribution.

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[2] "Normal contributions" is defined in Gov. Code § 31463 as "contributions by a member at the normal rates of contributions, but [which] does not include additional contributions by a member."

In stark contrast to the State's characterization, a thoroughgoing review of CERL and PEPRA as a whole demonstrates that not only do these laws fail to consistently use the "normal" contribution terminology when describing the actuarially-determined contribution rate, but, in fact, they consistently describe such contributions as "member" contributions. *E.g.* § 31453 (requiring actuarial valuation and setting subsequent procedure for changing "the rates of contributions of members"); § 31454 ("The board of supervisors shall, not later than 90 days after the beginning of the immediately succeeding fiscal year, adjust the . . . rates of contributions of members . . ."); § 31485.10 ("the contributions by a member . . ."). Even Section 31581.2—which plays such a major role in the State's arguments—does not specify that employers may pick up a portion of the member's "normal" contribution. Rather, it refers more generally to "the contributions required to be paid by a member." Gov. Code § 31581.2. These and other sections—which are plainly referring to the actuarially-determined rate that is sometimes referred to as the "normal contribution"—do not describe the contribution as "normal"; notably, however, they are consistent in describing it as the "member" contribution.

Even more critically, however, the State's argument is flawed because it completely ignores the way the terminology is used *in Section 31631 itself.* As discussed above, subsection (a) designates the term "employee contributions" to refer to "the contributions of a member or employer, or both" that employees are required to pay and requires an MOU as a condition for payment of such "employee contributions." In contrast, subsection (b) only concerns the ability of a governing body "to change the amount of member contributions." Gov. Code § 31631.[3] It strains credulity to maintain, as the State does here, that the Legislature used two distinctly different phrases in the same statutory section to mean precisely the same thing.

Furthermore, contrary to the State's position, neither Section 7522.30 nor Section 20516 supports the State's proposed construction of subsection (a). While Section 7522.30 adopts a "standard" of "[e]qual sharing of normal costs," it does so only for "new members." Gov. Code § 7522.30(a).

[3] Those "member contributions" identified in subsection (b) are plainly just one element of what is described in subsection (a). Gov. Code § 31631(a) (after describing the employer's ability to change "all or part of the ***contributions of a member*** or employer or both," providing that "[a]ll of those payments are hereby designated as ***employee contributions***.") (*emphasis added*).

In addition, Gov. Code § 20516(a) provides, "[W]ith or without a change in benefits, a contracting agency and its employees may agree, in writing, to share the costs ***of the employer contribution***." Compare that with Gov. Code § 31631(a), which states the employer may "without a change in benefits, require that members pay all or part ***of the contributions of a member or employer, or both***" only if there is an MOU. Thus, Section 20516(a) deals with agreements to pay a portion of the employer contribution whereas Section 31631(a) deals with compelled payment of all or part of the member and/or employer contributions. Given this clear difference in language, the State's argument that the two sections are substantively identical is untenable.

Finally, the State's contention that "as a practical matter" employee payment of a portion of the employer contribution was limited prior to PEPRA, and that this is what Section 31631(a) was intended to address, is also unconvincing. So called "reverse pickups" whereby employees agree to pay a portion of the employer contribution in order to obtain a higher benefit level have long predated PEPRA. *See, e.g.* Gov. Code § 31678.3(d) (2002 statute regarding payment of reverse pickups by employees of Orange County). This argument also conflates the term "employee contributions" used in Section 31631(a) with the term "accumulated contributions" defined in Section 31467. If Section 31631(a) was about making it easier to treat member payment toward employer contribution as "accumulated contributions," it would have simply used that term instead of (1) describing the subject matter as "the contributions of a member or employer or both," and (2) designating such contributions with the term "employee contributions."[4]

Like Respondents, the State's argument ignores inconvenient portions of the Section's language ("Notwithstanding any other law" and "contributions of a member") and ascribes to the remaining

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[4] Additionally, although the authorizing provision cited by the State, Section 31485.10, does indeed have some similar language to Section 31631(a), it has no bearing upon whether employees can be compelled to pay a higher employee contribution under Section 31631(a) without an MOU. Section 31485.10 allows certain counties to apply retirement benefit formulas that extend service credit back to a date preceding the resolution. Gov. Code § 31485.10(b). In order to fund a retroactive service credit such resolution may require the employees to pay both member and employer contributions "that would have been required if the [contribution formula] had been in effect during the time period" during which service credit is being extended. However, an MOU is required to do so if the members are represented. Gov. Code § 31485.10(c). There is no question that, like Section 31631(a), this section applies to both member and employer contributions and that, like Section 31631(a), it requires an MOU.

language hidden meanings that appear nowhere in the text ("accumulated contributions") and, as a result, fails to square the straightforward language of the Section with the meaning it seeks to ascribe to it. As a result, this Court should find that Section 31631(a) means what it says: in order to require employees to pay a portion of the employer and/or *member* contribution, an MOU is required.

B. Section 31631(a)'s Limited Protection for Existing Employees Does Not Defeat the Purpose of PEPRA

In its *amicus* brief, the State repeats the same arguments as Respondents and other *amici* about the legislative intent of PEPRA. As we have set forth at length in our prior briefing, while PEPRA seeks to shift a larger portion of public pension costs from public employers to employees, it also includes limited protections for existing employees. Giving meaning to these limited protections does not defeat the overall legislative purpose. Rather, it effectuates it.[5]

C. Section 31631's Plain Meaning Does Not Conflict With the Constitution

The State does not argue that a literal reading of Section 31631 violates the state Constitution nor does it provide any explanation as to how such a violation might be brought about by a literal reading of the statute. Instead, it assumes (without any explanation why) that a construction of Section 31631 which requires an MOU as a condition of imposing certain costs on affected existing employees would raise a "potential" constitutional issue. Such an unsupported assertion is no basis for ignoring the plain meaning of a legislative enactment. Thus, despite seeking a delay in these proceedings ostensibly to defend the constitutionality of Section 31631, the State fails to even actually address this issue.

Moreover, as we have previously explained, the arguments about why Section 31631 would interfere with a County's constitutional home rule prerogatives do not withstand close scrutiny. Section 31631(a) affects just one limited element of an employee's overall compensation (and only for employers who choose to participate) and, thus, it has no bearing on the employer's ability to set the overall compensation level. Significantly, the State takes the position that the requirement of an MOU before an employer can cause employees to pay any portion of the employer's contribution does not

[5] Moreover, even assuming that the State and Respondents were correct in their assessment of the Legislature's intent, it is clear that legislative intent cannot trump plain meaning. [*See* Petitioner's Reply Brief in Support of Verified Petition for Writ of Mandate, at 3-4].

implicate the home rule issue. [Amicus Brief, fnte 9, at 11.] However, the State offers no explanation of why an MOU requirement for employer contributions – similar to an MOU requirement for changes in the obligation to make employee contributions or the ending of an employer pick-up – does not present a home rule issue. It is OCAA's position that neither presents a home rule issue as Section 31631is not meaningfully different from numerous other conditions placed on the payment for, and structure (including funding) of, local government pensions by provisions of CERL and PEPRA on which Respondents and the *amici* rely--and the case law recognizes that the state may regulate such matters so long as such regulation does not deprive the local governing body entirely of its ability to set overall compensation. Accordingly, there is no need for a further detailed discussion of this issue here in response to the State's unsupported assumption that a conflict might ostensibly exist if Section 31631(a) requirement of an MOU is given its plain meaning.

III. Conclusion

Based on the foregoing and the argument set forth in the previous briefing, Petitioner Association respectfully requests that the Court grant a writ of mandate pursuant to Section 1085 of the Code of Civil Procedure directing the County and Board to rescind the unilateral imposition of retirement plan contribution requirements and for other appropriate relief because such unilateral acts by Respondents have unlawfully precluded a right to which Association members in the Attorney Unit are entitled.

Respectfully submitted,

Dated: April 4, 2014

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PROOF OF SERVICE
(Code Civ. Proc. § 1013a(3))

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party of the within action; my business address is 2670 North Main Street, Suite 300, Santa Ana, CA 92705.

On April 4, 2014, I served the document described as **PETITIONER'S SUPPLEMENTAL BRIEF IN OPPOSITION TO AMICUS CURIAE BRIEF BY THE STATE OF CALIFORNIA.** I served the document on the persons below, as follows:

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Executed on April 4, 2014, at Santa Ana, California.

Rita A. Pollard

RITA A. POLLARD