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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

ORANGE COUNTY ATTORNEYS ASSOCIATION,

Petitioner,

v.

COUNTY OF ORANGE; BOARD OF SUPERVISORS OF THE COUNTY OF ORANGE,

Respondents.

Case No.: 30-2013-00638110-CU-WM-CJC

Complaint Filed: March 25, 2013

RESPONDENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO PETITION FOR WRIT OF MANDATE

[Declaration of Mitch Tevlin and Request for Judicial Notice filed concurrently herewith]

Date: February 14, 2014
Time: 1:30 p.m.
Dept.: C25

(*Exempt from filing fees pursuant to Gov. Code, § 6103.)

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I. INTRODUCTION

Petitioner, Orange County Attorneys Association ("OCAA"), petitions this Court to order the County of Orange ("County") to pay the contributions employees are legally required to pay towards their pension in the Orange County Employees Retirement System ("OCERS"). In addition, OCAA petitions this Court to allow OCAA to renege on its contractual obligation to pay an additional contribution to OCERS to cover the cost of an enhanced retirement benefit that they requested and were granted seven years ago. OCAA's attempt to avoid paying what the law and contract require employees to pay must be denied.[1]

II. BACKGROUND FACTS

Employees of the County receive pension benefits as members of OCERS. (Decl. of Tevlin, ¶4.) OCERS is a pension system established pursuant to the County Employees Retirement Law of 1937 (Gov. Code §§ 31450 *et. seq.,* the "CERL").

A. RETIREMENT BENEFITS ARE BASED ON A RETIREMENT BENEFIT FORMULA

Under the CERL, the retirement benefit is established, in part, by the retirement *formula.* The retirement formula is expressed as a maximum percentage of final compensation at a certain age (example: 2.7% of final compensation at age 55). The retirement formula establishes the defined retirement benefit using three factors: a percentage of final compensation, the employee's age at retirement, and the years of service credit accrued by the employee. For example, a retirement formula of "2.7% at 55" means that the employee will receive a maximum retirement benefit at age 55 equal to 2.7% of the employee's final compensation multiplied by the employee's years of service credit. If the employee retires prior to the age of 55, the percentage of final compensation is decreased. (Gov. Code § 31676.19.) (Decl. of Tevlin, ¶ 5.)

When entering employment, the employee is assigned a retirement benefit formula applicable to the employee's group or class of employment. (Decl. of Tevlin, ¶6.) Under the CERL, the retirement benefit formula cannot be decreased after the employee is hired. However,

[1] OCAA's memorandum of points and authorities exceeds the page limit authorized by Rule of Court 3.1113(d) and therefore, the last four pages of OCAA's opening brief should be disallowed.

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prior to January 1, 2013, a county could provide an enhanced benefit formula after an employee's date of hire. (See, e.g. Gov. Code § 31676.19.)

For employees who are represented by OCAA, there were two retirement formulas that applied prior to July 1, 2005: 1) for employees hired on or before September 20, 1979, their retirement formula was 2.6% at 62; and 2) for employees hired on or after September 21, 1979, their retirement formula was 2.9% at 65. These two retirement formulas are collectively referred to herein as the "Old Formulas." (Ex. C, p. 85 to Decl. of Tevlin.)

Effective July 1, 2005, for employees who *retire* after July 1, 2005, the retirement formula is 2.7% at 55. This formula provides greater benefits than the Old Formulas. It is referred to herein as the "New Formula." (*Id.*; Decl. of Tevlin, ¶8.)

B. PENSION BENEFITS ARE FUNDED BY COUNTY AND MEMBER CONTRIBUTIONS

The CERL requires that pension benefits be funded from two sources: (1) contributions made by the County; and (2) contributions made by employees who are members of the retirement system. The County contribution rate is calculated as a certain percentage of the total compensation of all members. The contribution rate to be paid by each member is calculated as a certain percentage of the compensation of that member. The member contribution rate will vary depending on the age of the member when he or she became a member of OCERS. (Gov. Code, §§ 31453, 31453.5, 31454, 31463, 31581.) (Decl. of Tevlin, ¶7.) The CERL requires that the full amount of the member's contribution rate be automatically deducted from each employee paycheck. (Gov. Code, §§ 31625 and 31625.1.) However, the CERL allows the County, if it chooses, to pay all or a portion of the contribution required of employees, but not for employees who first enter OCERS as a member on or after January 1, 2013. (Gov. Code, §§7522.30, 31581.1, 31581.2.)

Each year, the OCERS actuary evaluates the pension system to ensure that the pension system remains adequately funded to provide current and future pension benefits. The actuary recommends employer and member contribution rates for the upcoming year. The OCERS' Board of Retirement approves the recommended contribution rates and that recommendation is

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submitted to the County Board of Supervisors to approve the employer and member contribution rates. (*See* Gov. Code §§ 31620, 31621, 31453, 31454.) (Decl. of Tevlin, ¶7; *see* Ex. A to Decl. of Tevlin [OCAA employees are in the "Plan J" retirement rate group].)

C. THE COUNTY AGREED TO PROVIDE THE NEW FORMULA TO OCAA EMPLOYEES SO LONG AS THERE WAS NO INCREASED COST TO THE COUNTY

In 2004, the County and OCAA entered into an MOU for 2004-2007. The County and OCAA agreed to adopt the New Formula for all OCAA employees. The New Formula applies to both service performed by employees prospectively and retroactively to service credit earned by employees prior to implementing the New formula. (Ex. B, p. 85 to Decl. of Tevlin.)

The increased costs required to fund the New Formula are: (1) a higher member contribution rate; (2) a higher employer contribution rate for service performed by employees prospectively; and (3) a "past service liability" contribution to fund the retroactive portion of the New Formula for service already performed by employees prior to implementing the New Formula. (Decl. of Tevlin, ¶11.)

Under the CERL, the members are responsible for the higher member contributions needed to fund the 2.7% at 55 formula. (Gov. Code §31678.2.) The County is responsible for the higher employer contribution. (Gov. Code §31581.) The County is also responsible for the "past service liability." (Gov. Code §31678.2(d).) However, the CERL allows the County to agree to pay all or a portion of the contributions required of employees, (Gov. Code §§31581.1 and 31581.2) and employees can agree to pay a portion of the County's contributions (Gov. Code §§31465, 31627, 31678.2(d)).

During labor negotiations in 2004 to implement the New Formula, the County and OCAA agreed that, the New Formula shall not result in any increased cost to the County and any difference being paid by employees and that this shall last in perpetuity beyond the expiration of the MOU. To that end, the parties agreed in the MOU,

> 3. Effective the pay period that commences on June 24, 2005, general members in this bargaining unit will make an additional employee contribution to the retirement system, in an amount equal to .54% of compensation earnable. This contribution will be in addition to the normal employee contribution calculated under

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> Section 31621.8 of the Government Code, and will be in addition to the employee contribution required to help provide full reserve funding of cost-of-living increases to retirees for all active members of the retirement system...The additional employee contribution made under this paragraph shall be in accordance with, and for the purposes stated, in Section 31678.3(d) of the Government Code. ***This additional contribution shall continue beyond the expiration date of this MOU, for the purposes of amortizing, over a 30 year period, the cost of the retirement benefit improvement resulting from the adoption of the "2.7 at 55" benefit formula in Section 31676.19 of the Government Code***.
>
> 4. It is the intent of the parties that the implementation of the ***2.7% at 55 retirement benefit formula shall be without additional cost to the County.*** ...the County and OCAA will annually review its costs including costs impacted by changes in the investment earnings and evaluate whether any adjustments to employee contributions are necessary. (Ex. B, pp. 85-86 to Decl. of Tevlin [Emphasis added].)

The parties contractually agreed that employees pay the difference between the County's employer contribution for the Old Formulas and the County's now higher contribution rate for the New Formula, as well as paying the "past service liability." This total contribution at the time of the 2004 MOU was equal to .54% of an employee's compensation. This employee contribution is referred to herein as the "Reverse Pick-Up." The parties also agreed that each year the value of the Reverse Pick-Up will be reevaluated and adjusted by the County to ensure that the County is not incurring any increased cost for the New Formula. The agreement continued in the 2007-2011 MOU. (Ex. B, pp. 85-86 and Ex. C, pp. 86-87 to Decl. of Tevlin; Decl. of Tevlin, ¶¶15-16.)

D. THE COUNTY PICKED-UP A PORTION OF THE *EMPLOYEE* MEMBER CONTRIBUTION RATE

Prior to implementing the New Formula in the 2004-2007 MOU, the County "picked-up" the full amount of the member (*employee*) contribution rate required under the CERL. (Decl. of Tevlin, ¶13.) This "pick-up" is referred to herein as the "County Pick-Up." In the 2004-2007 MOU, the County agreed to continue the County Pick-Up that was attributable to the *Old* Formulas, as if the Old Formulas continued to apply. This way, employees continued to enjoy the County Pick-Up received prior to implementing the New Formula, but were responsible for paying the *difference* between their member contribution rate under the Old Formulas and the higher member contribution rate required under the New Formula, in addition to paying the

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Reverse Pick-Up. (Ex. B, p. 86 and Ex. C, p. 87.)

As such, in the 2004-2007 MOU the parties agreed to an arrangement whereby the County would incur no increased cost due to the implementation of the New Formula, but which allowed employees to continue to enjoy the same County Pick-Up provided in previous MOUs. The parties agreed as follows:

1. Employees pay the difference between the member contribution rate under the Old Formulas and the member contribution rate under the New Formula;

2. Employees will pay the difference between the County's employer contribution rate under the Old Formulas and the County's contribution rate under the New Formula and this shall continue in perpetuity after expiration of the MOU;

3. Employees will also pay the past service liability created by the retroactive application of the 2.7% at 55 formula and this shall continue in perpetuity after expiration of the MOU (items 2 and 3 here are the "Reverse Pick-Up");

4. The County will never pay any of the three preceding employee obligations even after expiration of the MOU;

5. The County will, however, continue to pick-up the same portion of employee (member) contribution previously agreed for the Old Formulas, but this agreement was only for the term of the MOU.

6. The County will pick-up employee contributions needed for full reserve funding of cost-of-living ("COLA") increases for retirees, but this agreement was only for the term of the MOU (items 5 and 6 are the "County Pick-Up").

This same arrangement continued in the 2007-2011 MOU and the Reverse Pick-Up continued after the expiration of the MOU by express agreement. (Ex. B, pp. 85-86 and Ex. C, pp. 86-87 to Decl. of Tevlin.)

E. THE COUNTY LAWFULLY IMPOSES TERMS AND CONDITIONS OF EMPLOYMENT AFTER EXHAUSTION OF ALL COLLECTIVE BARGAINING OBLIGATIONS, INCLUDING IMPASSE PROCEDURES

In 2011 and 2012, the parties attempt to negotiate a successor MOU. When the parties were unable to reach an agreement, impasse was declared. Following all impasse procedures, the County proceeded to unilaterally implement its last, best and final offer by enacting Resolution 13-015 as allowed under the MMBA. (Gov. Code §§3505-3505.7; Decl. of Larry Yellin, ¶¶8-9.)

Resolution 13-015 imposed only one change relevant to this matter. The County will no longer pay the County Pick-Up (i.e. the amount of the normal member contribution rate for the Old Formulas and the employee's contribution required to fund the COLA for current retirees).

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As a result, employees will pay their full *member* contribution rate. (Gov. Code §§ 31581.1, 31581.2, 31621.8, 31625, 316251.) (Ex. C to Decl. of Larry Yellin.) Except as modified by imposition, all other terms and conditions set forth in the 2007-2011 MOU continue to apply, including the employees' agreement to pay the Reverse Pick-Up because the parties expressly agreed in the MOU that the Reverse Pick-Up continued even after expiration of the MOU. (*Id.*)

III. LEGAL ANALYSIS

A. IMPACT OF PEPRA ON COUNTY EMPLOYEES

The PEPRA, which became effective on January 1, 2013, made sweeping changes to California public retirement systems, including county retirement systems operating under the CERL, such as OCERS. Under the PEPRA, changes to retirement systems impact public employees in somewhat different ways depending on whether the employee is considered a "new member" of a public retirement system. A "new member" is generally defined as an employee who first enters the retirement system on or after January 1, 2013, with some exceptions. (Gov. Code §7522.04(f).) All other employees are often referred to as "classic" members.

PEPRA is intended to curtail enormous costs to public employers in sustaining substantially under-funded pension systems. To this end, the PEPRA includes: a prohibition on retirement benefit formula enhancements and institutes lower formulas for new members; a reduction in items of compensation that may be pensionable; a requirement that new members pay a member contribution rate that is one-half of the normal cost of the retirement benefit; a prohibition on employers picking-up any part of new member contributions; and avenues for employees to share any portion of the *employer's* contributions to the retirement system. (Gov. Code §§7522.02, 7522.20-7522.30, 7522.34, 20516 and 31631.)

The statutory aim of the PEPRA is to reduce, not *increase*, costs to the employer.

B. THE COUNTY HAS THE DISCRETION TO CONTINUE TO "PICK-UP" ALL OR A PORTION OF CLASSIC MEMBER CONTRIBUTIONS AND DISCONTINUE THE "PICK-UP" EVEN IF OCAA DOES NOT AGREE

The CERL allows a county to *choose* to pick-up all or a portion of the member contribution rate that classic employees are required to pay. The CERL requires that the County retain the right to discontinue paying employee member contributions even without agreement of

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the union. The authority for the County's pick-up of member contribution rates is found in sections 31581.1 and 31581.2. Section 31581.1 provides:

> (a) The board of supervisors *may elect* to pay up to one-half of the contributions normally required of members *for any period of time designated in the resolution* providing for such payment. The payments shall not become part of the accumulated contributions of the member. These payments may be made with respect to employees in one or more bargaining units irrespective of whether they are made with respect to other employees.
>
> (b) This section shall not apply to members who are subject to Section 7522.30.[2] ([Emphasis added].)

In addition, Section 31581.2 reads:

> The board of supervisors...*may agree* to pay any portion of the contributions required to be paid by a member. All payments shall be in lieu of wages and shall be reported simply as normal contributions and shall be credited to member accounts.
>
> The enactment of a resolution pursuant to this section *shall not create vested rights* in any member. The board of supervisors or the governing body of the district *may amend or repeal the resolution at any time*, subject to the provisions of Sections 3504 and 3505, or any similar rule or regulation of the county or district.[3]
>
> This section shall not apply to members who are subject to Section 7522.30. ([Emphasis added].)

The County Pick-Up provided to classic employees prior to March 5, 2013 was pursuant to both sections 31581.1 and 31581.2. (*See* Ex. B, p. 86 and Ex. C, p. 87 to Decl. of Tevlin.) Both make clear that it is the County's choice to pick-up any part of employee member contributions or to discontinue that benefit so long as it exhausts all collective bargaining procedures, including impasse procedures. Neither statute requires the agreement of OCAA to discontinue the County Pick-Up. That is exactly what the County lawfully did here.

[2] Section 7522.30, a provision in the PEPRA, provides that employers may not pay any portion of the member contributions of a "new member."

[3] The cross-reference to Government Code sections 3504 and 3505, part of the MMBA which governs labor relations for California's municipal governments, refers to the employer's obligation to engage in good faith negotiations with a labor organization. However, it does not require an employer to reach agreement with the employee organization. Where impasse procedures under the MMBA are unsuccessful, the MMBA allows an employer to unilaterally impose upon employees terms and conditions of employment. (Gov. Code §§ 3505.2 – 3505.7.)

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C. SECTION 31631, A PART OF THE PEPRA, ALLOWS EMPLOYEES TO PAY A PORTION OF THE EMPLOYER CONTRIBUTION RATE

Government Code section 31631 was enacted as part of PEPRA and provides, in part:

> Notwithstanding any other law, a board of supervisors.... may, by resolution, ordinance, contract, or contract amendment under this chapter, 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....
>
> Nothing in this section shall modify a board of supervisors' or the governing body of a district's authority under law as it existed on December 31, 2012, including any restrictions on that authority, to change the amount of member contributions. (Emphasis added.)

The Senate Floor Analysis for the PEPRA (Assembly Bill 340) stated the intent was to, "*Allow more flexibility for bargaining increased cost sharing between employers and existing employees* in CalPERS and retirement systems established pursuant to the County Employees' Retirement Law of 1937 ('37 Act)." (Ex. 1 to Resps.' Req. for Jud. Ntc. [emphasis added].) The intent to give employers and employees an avenue for employees to pay a portion of the *employer's* contribution rate. It was enacted as part of the PEPRA, and the design of the PEPRA is to *reduce* pension costs for employers.

Here, OCAA is erroneously using section 31631 as a sword against the County to argue that: (1) OCAA must *agree* that the County can discontinue the County Pick-Up, contrary to the clear statutory language of sections 31581.1 and 31581.2; and (2) OCAA can essentially withdraw its long term commitment to fund a portion of the County's employer contribution rate for the New Formula (i.e. the Reverse Pick-Up). OCAA also argues that section 31678.3 allows it to withdraw its agreement in the MOU to pay the Reverse Pick-Up.

OCAA's arguments require this Court to answer the following three questions:

1. Does section 31631 prohibit the County from discontinuing the County Pick-Up?
2. Does section 31631 require that the County obtain a *new* agreement from OCAA to continue OCAA's pre-existing agreement to pay the Reverse Pick-Up?

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3. Does section 31678.3 require the County to obtain a *new* agreement from OCAA to continue OCAA's pre-existing agreement to pay the Reverse Pick-Up?

As explained below, the answer to each of these questions is a resounding "no," and therefore, OCAA's Petition for Writ of Mandate must be denied.

1. Nothing In Section 31631 Prohibits the County From Discontinuing Its Pick-Up of Employee Member Contributions

a. The Pick-Up Statutes, Sections 31581.1 and 31581.2, Are the Controlling Authority, *Not* Section 31631

There are several cannons of statutory interpretation relevant here. First, the legislature is presumed to be aware of the laws in effect at the time it enacts new laws and is conclusively presumed to have enacted the new laws in light of existing laws having direct bearing upon them. (*McLaughlin v. State Bd. Of Educ.* (1999) 75 Cal.App.4th 196, 212 quoting *Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332.) Second, where a general statute standing alone would include the same matter as a more specific statute, and thus conflict with it, the more specific statute will be considered as an exception to the general statute regardless of whether the more specific statute was enacted before or after the general statute. (*McLaughlin, supra,* 75 Cal.App.4th 196, 224.) Third, Courts must not interpret one statute to eviscerate the import and application of another statute, but must interpret in such a way so as to preserve statutory harmony and effectuate the intent of the Legislature. (*Id.* at 219-220.)

The only relevant statutes to this issue are sections 31581.1 and 31581.2 (collectively referred to as the "Pick-Up Statutes"). The first Pick-Up Statute, Section 31581.1, states that the County "*may elect*" to pick-up up to one-half of employee member contributions, but this pick-up only lasts for the "*period of time designated in the resolution*." (Emphasis added.) Section 31581.1 does not require the agreement of employees or any labor organization to discontinue the pick-up. The County made this election, but the pick-up was only for the period of time designated by the MOU (i.e. up until June 16, 2011) as approved by resolution of the Board of Supervisors. (Ex. C to Decl. of Tevlin.)

The second Pick-Up Statute, Section 31581.2, states that the County "may agree" to pick-up any other portion of the employee member contribution, but the County "*may amend or repeal*

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the resolution at any time." (Emphasis added.) This section does not require the agreement of the labor organization, only that the County exhaust its meet and confer obligations under the MMBA. The County chose to pick-up employee member contributions, but it lawfully repealed its decision to do so after exhausting all of its obligations under the MMBA.

The Pick-Up Statutes end this issue, entirely. The Court need not look to any other authority than these two statutes to find that the County had every right to unilaterally impose a discontinuation of the County Pick-Up after exhausting all impasse procedures under the MMBA.

OCAA, however, seeks to draw the Court's attention away from the only two statutes that decide this issue and to focus the Court on an overbroad, ambiguous and inapplicable statute, section 31631. Yet, to interpret section 31631 in the manner OCAA asks would completely nullify and eviscerate every meaning to the Pick-Up Statutes.

The Legislature was well aware of the Pick-Up Statutes when it enacted section 31631 and had no intention of repealing, amending or changing their import. First, the Legislature included subsection (b) to section 31631which states: "Nothing in this section shall modify a board of supervisors' or the governing body of a district's authority under law as it existed on December 31, 2012, including any restrictions on that authority, to change the amount of member contributions." The Pick-Up Statutes existed as of December 31, 2012 and expressly provide that pick-ups can be modified or eliminated by the County even without the agreement of OCAA. Accordingly, the plain reading of section 31631 does not change the County's ability to terminate the pick-up, even over OCAA's objection.

Second, the Legislature amended the Pick-Up Statutes *after* enacting section 31631. The amendment specified that the Pick-Up Statutes do not apply to "new members" under the PEPRA, since PEPRA prohibits employers from picking up any portion of new member contributions. This demonstrates the Legislature was well aware that the Pick-Up Statutes continued in full force and effect even after the enactment of section 31631. Accordingly, section 31631 was not intended to eliminate, repeal or change the Pick-Up Statutes.

Third, the Pick-Up Statutes are more specific on this issue. Section 31631 makes *no mention* of a county picking up contributions required to be paid by members. To the contrary,

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section 31631 demonstrates only members paying member contributions and members paying employer contributions. Therefore, the Pick-Up Statutes are the controlling authority and allow the County to discontinue paying employee member contributions, with or without the agreement of OCAA. Section 31631 has no application to this issue.

b. OCAA's Interpretation of Section 31631 To Require OCAA's Agreement In Order to Discontinue Paying Member Contributions Would Nullify the Intent of the PEPRA

"One ferrets out the legislative purpose of a statute by considering its objective, the evils which it is designed to prevent, the character and context of the legislation in which the particular words appear, the public policy enunciated or vindicated, the social history which attends it, and the effect of the particular language on the entire statutory scheme. [Citations.]" (*Santa Barbara County Taxpayers Assn. v. County of Santa Barbara* (1987) 194 Cal.App.3d 674, 680.) "'[I]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." (*People v. Pieters* (1991) 52 Cal.3d 894, 898 [citations omitted].) "Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (*Id.* citing *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) "Finally, we do not construe statutes in isolation, but rather read every statute "'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'" (*Id.* quoting *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 814.)

Since its enactment over 75 years ago, the CERL requires members to pay their own member contributions. In 1976, section 31581.1 was enacted; and in 1983, section 31581.2 (the Pick-Up Statutes). Since that time, the Pick-Up statutes have preserved the *County's* right to pick-up any part of employee member contributions and to decide when it will discontinue paying those member contributions.

The PEPRA was enacted to reduce pension costs to public employers. In doing so, the PEPRA instituted provisions, including: (1) employers cannot pick-up any portion of new member contributions; (2) employers and classic employees are encouraged to increase classic member contribution rates to 50% of the normal cost of the retirement benefit; and (3) employers

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and employees are encouraged to agree that *employees* will pay a portion of the *employer* contribution to the retirement benefit. (Gov. Code §§ 7522.30, 31631.5, 31631.)

The OCAA would now have this Court read section 31631 to require that the County obtain the approval of employees in order to cease paying their required *member* contributions. It is incomprehensible that the Legislature, in enacting a pension *reform* act designed to curb the cost of public pensions on local agencies paid by taxpayers, would enact a statute that actually changes long standing and still valid law in order to *impose increased* costs on the employer. This Court must avoid absurd results and thereby preserve the legislative intent of the PEPRA by finding that section 31631 does not require OCAA's agreement before the County can discontinue paying employee member contributions.

c. OCAA's Argument Would Render Section 31631 Unconstitutional

A statute must be read in a manner that does not render it unconstitutional. "Judicial doctrine governing construction of a law to avoid unconstitutionality is well settled. If 'the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution.'" (*Metromedia, Inc. v. City of San Diego* (1982) 32 Cal.3d 180, 906 quoting *County of Los Angeles v. Legg* (1936) 5 Cal.2d 349, 353.)

Here, if section 31631 is to be read in the manner argued by OCAA, it would be unconstitutional as a violation of the "Home Rule" doctrine.[4] Article XI, Section 1 of the California Constitution provides, in relevant part, "...Except as provided in subdivision (b) of Section 4 of this article, *each governing body* [of a County] *shall prescribe by ordinance the compensation of its members*,...The *governing body* shall provide for the number, *compensation*, tenure, and appointment of employees." ([Emphasis added].)

Article XI, Section 11 of the California Constitution provides, in relevant part, "(a) The Legislature *may not delegate to a private person or body* power to make, control, appropriate,

[4] To be clear, Respondents do not assert that section 31631 under its reasonable interpretation is unconstitutional, only that OCAA's unreasonable interpretation would render the statute unconstitutional.

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supervise, or interfere with county or municipal corporation improvements, *money*, or property, or to levy taxes or assessments, or perform municipal functions. ([Emphasis added].)

In *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, the Legislature enacted Senate Bill 402 adding to the MMBA a requirement that where a local government and a labor organization were unable to reach agreement on economic issues, the matter shall be submitted to binding arbitration. A panel of arbitrators were thereby empowered to impose economic terms of employment, including compensation and benefits for employees. The county refused to comply with the law, finding it unconstitutional under Article XI, Sections 1 and 11.

The California Supreme Court agreed. "The constitutional language is quite clear and quite specific: the *county*, not the state, not someone else, shall provide for the compensation of its employees." (*Id.* at 285 [emphasis in original].) "Senate Bill 402 would unconstitutionally permit the union to change the county's governing board from the body that sets compensation for its employees to just another party in arbitration." (*Id.* see also *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322 [striking down a requirement that local governments and labor organizations submit to binding arbitration on economic items where the arbitrators' decision could only be rejected by an unanimous vote of the board of supervisors].)

Here, the County, a charter county, is vested with the sole authority to determine compensation for its employees and this authority cannot be delegated to a private body. OCAA's argued interpretation of section 31631 would grant OCAA, and not the County, the authority to decide whether employees will pay their own member contributions. The result is OCAA could, by refusing to agree to a change in the pick-up, require the County to pay higher compensation to employees without the approval of the Board of Supervisors in violation of Article XI, Sections 1 and 11 of the California Constitution.

Section 31631 cannot be read in a manner to render it unconstitutional. To accept OCAA's interpretation would do just that. Through recent case law, the Legislature is well aware of its limits in enacting laws that divest the authority of a county to determine the compensation of its employees, particularly in situations that would essentially grant labor unions the power to determine their own compensation. (*County of Riverside, supra,* 30 Cal.4th 278, 285; *County of*

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Sonoma, supra, 173 Cal.App.4th 322, 343.) On the other hand, the Pick-Up Statutes are inherently compliant with Constitutional constraints because they retain the County's ultimate authority to decide whether to pay its employees' member contributions.

Section 31631 does not require the County to obtain the approval and agreement of OCAA before it can discontinue picking up employee member contributions.

2. Section 31631 Does Not Require the County To Obtain a New Agreement with OCAA To Continue the Reverse Pick-Up

Generally, when a collective bargaining agreement expires, so do the terms stated therein. However, if the language of the MOU expressly or impliedly states that a benefit is to continue after the expiration of the MOU, the parties are contractually bound to continue the benefit. (*International Broth. v. City of Redding* (2012) 210 Cal.App.4th 1114, 1119-20 [contractual promise to provide retiree health benefits "in the future" was sufficient to allege a benefit that survived the expiration of the contract].)

The County and OCAA agreed the New Formula will not increase the County's costs over what the County was paying for the Old Formulas. (Ex. B, p. 86 and Ex. C, p. 87 to Decl. of Tevlin.) Most importantly, OCAA agreed that the Reverse Pick-Up, "shall continue beyond the expiration date of this MOU, for the purpose of amortizing, over a 30 year period, the cost of the retirement benefit improvement resulting from the adoption of the '2.7% at 55' benefit formula in Section 31676.19 of the Government Code." (Ex. B, p. 85 and Ex. C, p. 86 to Decl. of Tevlin.) Indeed, when the 2004-2007 MOU and the agreement to implement the New Formula were submitted to the Board of Supervisors for approval, the Board was assured: "...the proposed MOU's [sic] set forth the intent of the parties that the change is without additional cost to the County. The MOU's [sic] confirm that payments continue on past the expiration date of the contracts, and are intended to cover the 30-year amortization period...." (Ex. E, p. 4 to Decl. of Tevlin.) Now, OCAA wants to continue to receive the significant benefit provided by the New Formula, which by law the County cannot rescind, while unilaterally reneging on its agreement to fully pay for it. In doing so, OCAA defrauds the County and its Board of Supervisors of the promises made when employees were granted this benefit.

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Moreover, OCAA attempts to argue that the County *imposed* the Reverse Pick-Up on employees. The County did nothing of the sort. It is undisputed that OCAA agreed to it. A plain reading of Resolution 13-015 shows the only thing the County imposed is that it will no longer pick-up any of the normal member contributions required of employees. Resolution 13-015 makes no mention of the Reverse Pick-Up. The imposition of terminating the County Pick-Up had no effect whatsoever on the continuation or value of the Reverse Pick-Up. The Reverse Pick-Up remains exactly the same as the parties agreed before the County discontinued the County Pick-Up. (Decl. of Tevlin, ¶17.)

Section 31631 requires that the cost sharing be approved in an MOU, not that an MOU must perpetually exist for these promises to be enforced. The County never imposed this requirement, it was agreed to by OCAA *and* it was agreed it would continue even after the MOU expired. Therefore, the County did not violate section 31631.

3. Section 31678.3 Does Not Require the County to Obtain a New Agreement With OCAA for Employees to Continue Paying the Past Service Liability

Section 31678.3 permitted the County to adopt the New Formula. Section 31678.3(d) allows the County and OCAA to agree that *members* will pay the contribution attributable to the past service liability.

The County and OCAA *agreed* that members will pay the past service liability and that members will pay a portion of the County's contribution. They also agreed that these payments (the Reverse Pick-Up) would continue "beyond the expiration date of this MOU, for the purpose of amortizing, over a 30 year period, the cost of the retirement benefit improvement." (Ex. B, p. 85, Ex. C, p. 86, Ex. E, p. 4 to Decl. of Tevlin.) These obligations were never imposed. Section 31678.3(2) cannot be violated if OCAA agreed that employees will pay the Reverse Pick-Up *and* that the agreement would last even after the expiration of the MOU.

IV. CONCLUSION

For all of the reasons stated herein, the County requests the Court deny OCAA's Petition for Writ of Mandate in its entirety.

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Respectfully submitted,

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