

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF ORANGE  
CENTRAL JUSTICE CENTER**

**MINUTE ORDER**

DATE: 08/12/2014

TIME: 02:23:00 PM

DEPT: C25

JUDICIAL OFFICER PRESIDING: Thierry Patrick Colaw

CLERK: P. Rief

REPORTER/ERM: None

BAILIFF/COURT ATTENDANT: None

CASE NO: **30-2013-00638110-CU-WM-CJC** CASE INIT.DATE: 03/15/2013

CASE TITLE: **Orange County Attorneys Association vs. County of Orange**

CASE CATEGORY: Civil - Unlimited      CASE TYPE: Writ of Mandate

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EVENT ID/DOCUMENT ID: 72006977

**EVENT TYPE:** Under Submission Ruling

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**APPEARANCES**

There are no appearances by any party.

The court, having taken the above-entitled matter under submission on 08/01/2014 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

**NOTICE OF RULING**

1. Petition by Orange County Attorneys Association for Writ of Mandate:

(a) By its petition for writ, Petitioner Orange County Attorneys Association seeks a writ of mandate to respondent County of Orange directing it "to rescind its unilateral imposition of retirement plan contribution requirements that were not approved in an MOU between the Association and the County."

More specifically, the Association seeks an order requiring the County (1) to continue its "pick-up" of what would otherwise be the employees' share of contribution for the basic retirement benefit and/or (2) to end the "reverse pick-up" under which the Association members are paying the County's share of contribution for the enhanced, "New Formula," retirement benefit, which contribution consists of funding for (i) past service liability and (ii) benefits arising from prospective service.

(i) Some History:

Petitioner, the Association, is an "employee association" recognized by Respondent, the County, as the exclusive bargaining representative for County employees within the Attorney Unit. The Association and the County have over the years collectively bargained for retirement benefits and contributions. Their

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agreements on these terms have been set forth in Memoranda of Understanding ("MOUs").

Upon retirement, members of the Association receive benefits pursuant to the County Employees Retirement Law of 1937 ("CERL"), which benefits are provided through the Orange County Employees' Retirement System ("OCERS"). As required by CERL, these retirement benefits are essentially funded by employer and employee contributions through the member's employment with the County. Retirement benefits are paid according to a formula applied to the member during employment; accordingly, the funding contributions made by the member employee and the employer, too, are determined by the applicable formula.

Under the Meyers-Milias-Brown Act (Gov. Code §§ 3500-3510, "MMBA"), employment terms, including retirement benefits, of represented County employees are subject to meet and confer requirements. MMBA permits each local employer to draw up its own reasonable rules and regulations to promote communication and improve relations between public employers and their employees by providing a reasonable method of resolving disputes on wages, hours, and other terms and condition of employment. Govt. Code § 3500. All matters relating to employment conditions and employee/employer relations are within the scope of representation, and thus subject to meet and confer obligations. *Claremont Police Officers Ass'n v. City of Claremont* (2006) 39 Cal. 4th 623, 630. When the parties are unable to reach agreement, the public agency can implement its last, best, and final offer after exhausting impasse procedures. Govt. Code § 3505.7.

As of 1/1/13, California enacted the Public Employees' Pension Reform Act of 2013 ("PEPRA"). PEPRA made a number of substantial changes to the public employee pension laws in California, including CERL, in order to reduce the overall pension liability of, and cost to, public employers.

**(ii) Events Giving Rise to Issues Raised by Pending Writ**

Beginning in about 1980, there were two possible retirement formulas for Association members. For those hired on or before 9/20/79, the formula was 2.6% at 62; for those hired on or after 9/20/79 the retirement formula was 2.9% at 65. Together, these are referred to as the "basic retirement benefit" or "Old Formulas." Subsequently, and as will be discussed further below, a new retirement formula was used: 2.7% at 55 (the "New Formula").

Under these formulas, the County's contribution is calculated as a percentage of the total compensation of all members. The employee, or member contribution, is calculated as a percentage of that employee's compensation. The individual employee contribution rate varies depending on the age of the employee when he or she became member of OCERS. CERL requires that the full amount of the employee's contribution be automatically deducted from his or her paycheck; but the County, if it chooses, may (for employees who became OCERS members before 1/1/13) pay all or a portion of the employee's contribution.

In 2000, the County and the Association negotiated and agreed that, beginning mid-2002, in lieu of paying a 3.5% pay increase to Association members, the County would pay – or "pick up" – all employee contributions required to fund the basic retirement benefit. This was reflected in the MOU at the time, the 2000-03 MOU, and was continued in successor MOU's up through the 2007-11 MOU that expired on 6/16/11. This is referred to as the "pick-up."

In the 2004-07 MOU, the Association and the County agreed that employees in the Association retiring on or after 7/1/05 would receive retirement benefits calculated under the New Formula. The increased

costs required to fund retirement benefits under the New Formula were: (1) higher member contribution rates; (2) 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 performed prior to implementation of the New Formula.

Under CERL, the employees are responsible for the higher employee contributions needed to fund the 2.7% at 55 formula. The County is responsible for the higher employer contribution. The County is also responsible for the "past service liability." Also under CERL, though, the County could agree to pay all or a portion of the employee contribution and the employees can agree to pay a portion of the County's contribution. In fact, such an agreement was made.

This agreement found in the MOU at Article XXI, titled "Retirement," Sections 1.F and 1.G.

In the MOU, the County and the Association agreed that the employees would pay for the additional contribution to OCERS necessary to fund the cost of the New Formula retirement benefits. That is, the employees would pay both their own employee contribution and the County's (i) prospective employer contribution and (ii) "past service liability." The employees' payment of components (i) and (ii), together, is called the "reverse pick-up."

(iii) **The Pick-Up**

**Govt. Code § 31631 (or, the County's Power to Terminate the Pick-Up post-PEPRA)**

Subsection (a) defines the scope of section 31631, while subsection (b) carves out an exception to the application of subsection (a).

Subsection (a) provides that the County may, "without a change in benefits, require that members pay all or part of the contributions of a member or employer, or both . . . [And that] 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.  
Govt. Code § 31631(a).

Unless subsection (b) carves termination of a pick-up out from the effect of subsection (a), the County did not have the power to end the pick without an MOU in which the members agreed to such termination. By its terms, subsection (b) permits the County to change the amount of "member contributions" to the same degree it could before section 31631 was enacted.

It is undisputed that pre-section 31631, the County could limit the pick-up under sections 31581.1 and 31581.2. So the only remaining question is whether such authority is what is encompassed by subsection (b). The court finds that it is.

In short, a public employer can pass a resolution that the employees will pay part of the employer's contribution only if the employees agree in an MOU, but the public employer retains whatever pre-existing power it had to increase the member's payment toward his own allotted share by decreasing or stopping the employer's pick-up of the employee's statutorily allotted share. Here, that means the County retained the power it had under sections 31581.1 or 31581.2 to stop paying its pick-up of part of the members' contributions.

This result is consistent with PEPRA's goal of limiting public employer pension liabilities.

(iv) **The Reverse Pick-Up**

**Govt. Code § 31631**

The practical and real effect of the County's actions was to "require" the members to pay the reverse-pick beyond the effective date of the MOU and apparently at the behest of the County. A public employer requiring its employees to pay a portion or all of the employer's pension contribution falls squarely within the terms of Govt. Code § 31631(a). Thus, the County's requiring that the members of the Association pay to fund the County's share of the cost of the New Formula retirement benefits – that is, the (i) employer contribution for prospective service and (ii) "past service liability" - falls within the terms of section 31631(a).

At Section 1.F.3, the MOU provides that the "additional employee contribution" of "0.54% of compensation earnable" "shall be in accordance with, and for the purposes stated in Section 31678.3(d) of the Government Code [and] this additional contribution 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."

The reference in section 1.F.3 to Govt. Code § 31678.3, which provides for payment of past service liability should the county adopt the New Formula, is significant. While the language in section 1.F. is not absolutely clear, it cannot be ignored that section 1.F.3 specifically refers to the "*additional employee contribution* [previously defined within the paragraph as being 0.54% of compensation earnable] made *under this paragraph*" as being made under a statute addressing only past service liability and that "[t]his additional contribution" shall continue for 30 years.

The court concludes that the MOU provision for payment by the Association members beyond the expiration of the MOU and for a total of 30 years applies only to the past service liability portion of the reverse pick up. As to this portion of the reverse pick, the MOU satisfies the requirements of Govt. Code § 31631(a).

**Govt. Code § 31678.3**

Section 31678.3 permits the County to adopt enhanced retirement benefits, such as the New Formula, for members of an employee bargaining unit. Govt. Code §31678(b). This provision was enacted specifically for Orange County. Govt. Code § 31678.3(g). Beginning in 1/1/13, if any portion of section 31678.3 conflicts with PEPRA, PEPRA shall prevail. Govt. Code § 31678.3(h).

This statute also specifically provides that, if such a plan is adopted, the resolution adopting it may require the members to pay a portion of the contributions attributable to past service liability, that would have been required if the benefits had been in effect during the period of time designated in the resolution. Govt. Code §31678.3(d). Such payments must first be approved in an MOU made under the MMBA.

The result under section 31678.3(d) is the same for the past services liability as it was under section 31631(a).

(b) The court's Decision/Ruling:

The Association's petition is granted as to the reverse pick-up of the County's contribution to fund retirement benefits under the New Formula for prospective service (item (ii) above). Otherwise, the Petition is denied.

(c) The County's request for judicial notice is granted.

The Association's evidentiary objections to paragraphs, or portions, nos. 5, 6, 11, and 16 are overruled; its objections to paragraphs, or portions, 8, 10, 12, and 13 are sustained.

2. The County is to prepare a proposed judgment.

3. The Clerk shall give Notice.