PUBLIC EMPLOYEE PENSIONS AND PEPRA LITIGATION THE CHRONOLOGICAL HISTORY OF *DSA v. CCCERA*.[1]

Douglas Pipes, Esq., House Counsel
Retiree Support Group
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This is a chronological history of the litigation entitled *Deputy Sheriff's Association et al. v. Contra Costa County Employees Retirement Association* [hereafter *DSA v. CCCERA*], which had its origins in a landmark 1997 decision of the California Supreme Court which has become known as the *Ventura* decision. The *Ventura* decision required that numerous items of compensation paid in cash must be included in a public employee's Final Compensation calculation when determining that employee's retirement pension. More than 20 years later, *DSA v. CCCERA* is poised to produce another landmark decision of the California Supreme Court regarding public employee pensions.

August 14, 1997 - *Ventura County Deputy Sheriffs' Association v. Board of Retirement of Ventura County Employees' Retirement Association et al.,* 16 Cal.4th 483 (1997) [hereafter *Ventura]*.

The California Supreme Court held that items of compensation paid in cash must be included in the "compensation earnable" and "final compensation" on which an employee's pension is based.

The *Ventura* decision became final on October 1, 1997.

December 5, 1997 - CCCERA Board of Trustees Adopted Final Compensation Policy.

The CCCERA Board of Retirement adopted a policy entitled "Determining Which Pay Items are 'Compensation' For Retirement Purposes." This Policy implemented the

[1]The opinions and statements expressed in this Paper are those of the author and do not claim to express the views of the Retiree Support Group of Contra Costa County. This paper is intended for informational purposes only for members of the Retiree Support Group of Contra Costa County. This paper and the statements made herein do not constitute legal advice or an attorney-client communication between the author and any other person. Persons who wish to obtain such legal advice are encouraged to consult and/or retain an attorney.

Ventura decision and was applied prospectively – only to persons who retired on or after October 1, 1997.

The CCCERA Board's adoption of its Final Compensation Policy followed the Board's receipt of written legal advice from two separate law firms.

October 14, 1999 – Superior Court Approval of *Paulson* and *Walden* Settlements.

The Contra Costa County Superior Court approved a Settlement Agreement entered into by (1) a group of retirees who had retired prior to October 1, 1997, (2) CCCERA, and (3) every employer member of CCCERA, including Contra Costa County, in the cases of *Vernon Paulson v. Contra Costa County Employees' Retirement Association,* and *Donald Walden v. Contra Costa County Employees' Retirement Association.*

The Settlement Agreement provided that the CCCERA Final Compensation Policy would be applied to all members of CCCERA who had retired prior to October 1, 1997, **and to all active employees.** The Settlement Agreement further provided that the settlement would not be changed because of later court developments or court determinations that enlarge, define, narrow, or otherwise relate to the items of compensation to be included for benefit purposes in the calculation of final compensation.

From 1997 until 2010 CCCERA computed retirement pensions using a formula that considered your years of public service and your "Final Compensation." CCCERA's system for computing an employee's "Final Compensation" followed the "Final Compensation Policy" that had been adopted by the CCCERA Board of Retirement in December of 1997.

March 10, 2010 – CCCERA Board Amendment of Final Compensation Policy For Members On or After January 1, 2011.

In 2010 there was an effort to change the way "Final Compensation" was computed by CCCERA. On March 10, 2010, following a public meeting attended by hundreds of persons, the CCCERA Board of Retirement voted to retain its existing "Final Compensation Policy" for all persons who had already retired and for all current County and District employees hired prior to January 1, 2011. The Retirement Board's decision meant that no person who had already retired faced a reduction in his or her pension that would have been caused by a retroactive change to the "Final Compensation Policy."

However, the CCCERA Board of Retirement voted to amend its "Final Compensation Policy" for new employees who joined CCCERA on or after January 1, 2011. The amended Final Compensation Policy provided that for persons who joined CCCERA on or after January 1, 2011, lump sums paid at termination would be counted toward compensation earnable and final compensation only to the extent that the lump sums that represent time earned and cashable during the final compensation period.

The Instigating Legislation – PEPRA.

September 12, 2012 - PEPRA [Public Employees' Pension Reform Act of 2012] enacted into law, effective January 1, 2013.

On September 12, 2012, the Governor signed into law the Public Employees' Pension Reform Act of 2013 (PEPRA). PEPRA, which went into effect on January 1, 2013, PEPRA (Assembly Bills 340 and 197) amended Government Code Section 31461 of the County Employees' Retirement Law of 1937 (CERL) to greatly restrict what can be counted in computing a retiree's "compensation earnable."

October 30, 2012 – CCCERA Board Voted 7-2 to Apply PEPRA's Definition of "Compensation Earnable" to All Employees Who Had Not Retired Prior to January 1, 2013.

On October 30, 2012, the CCCERA Board of Retirement voted 7-2 to amend its "Final Compensation Policy" to conform its provisions to the provisions of PEPRA for current County and District employees who did not retire prior to January 1, 2013, and for deferred retirees who did not begin to draw their retirement allowances prior to January 1, 2013. At that meeting the Retirement Board stated that it would not apply these changes to existing retirees.

Litigation Over PEPRA

November 27, 2012 – Contra Costa County Deputy Sheriffs' Association and United Professional Firefighters Association of Contra Costa County, Local 1230 Petition for Writ of Mandate.

The Deputy Sheriffs' Association and Firefighters, Local 1230 filed a petition for writ of mandate in the Contra Costa County Superior Court requesting the Court to order CCCERA to apply the pre-PEPRA "compensation earnable" definition of CERL to all employees hired prior to January 1, 2011, and to set aside its decision of October 30, 2012, that applied PEPRA to existing employees.

The case was assigned to Contra Costa County Superior Court Judge David Flinn, who issued an order staying the implementation of PEPRA as to existing County and District employees pending resolution of the writ petition.

That suit resulted in a consolidated legal battle in the Superior Court of Contra Costa County involving current employees in four jurisdictions (Contra Costa, Alameda, Marin, and Merced Counties) and their respective retirement systems.

November 8, 2013 – Judge Flinn's Decision Upon Preliminary Issues.

Judge Flinn issued a decision upon preliminary issues in which he ruled that the pre-PEPRA definition of "compensation earnable" in Section 31461 of CERL did not permit a multi-year calculation of accrued leave time to be counted toward "compensation earnable" when cashed out all in one year. Judge Flinn requested further briefing and argument on what contractual rights the current employees might have because of CCCERA's practices in counting multi-year accumulations of accrued leave when calculating pension awards.

December 17, 2013 – Tentative Combined Decision of Judge Flinn.

Judge Flinn issued a tentative 43 page final combined decision holding that a writ of mandate would be issued to restrain CCCERA from enforcing its October 30, 2012, decision to apply the "compensation earnable" definition of PEPRA to legacy employees who, "prior to the enactment of AB 197 accumulate[d] vacation beyond the amount that when cashed out will be in excess of the amount that, using a FIFO [first in, first out] calculation, will still be allowable as 'compensation earnable.'"

May 12, 2014 – Superior Court Final Judgment and Issuance of Writs of Mandate.

On May 12, 2014, Judge Flinn issued a final judgment and writs of mandate covering three subjects that are important to active Contra Costa County employees:

> **Vacation Sale.** The Court held that an active Contra Costa employee member of CCCERA who retires after December 31, 2012,[2] may include the monetary compensation for the sale of vacation that was accumulated prior to January 1, 2013, that could have been taken, and that exceeded the amount that he or she could have earned during the final compensation period.

[2] The January 1, 2013, effective date of PEPRA as to active employee members of CCCERA was extended to July 11, 2014, by a stay order issued by Judge Flinn on November 27, 2012.

In lay terms, Judge Flinn ruled that any current employee member of CCCERA who accumulated vacation prior to January 1, 2013, that was beyond the amount that the employee might earn during the employee's final compensation year may count the cash received for selling that accumulated vacation as "compensation earnable" in determining the employee's final compensation upon retirement.

Terminal Pay. The Court held that no active employee member of CCCERA who retires after December 31, 2012,[3] may count in his or her final compensation leave time cash outs receivable as terminal pay.

On Call, Standby, Call Back Pay. The Court held that an active Contra Costa employee who retires after December 31, 2012,[4] may include the monetary compensation received for on call, standby, or call back pay that was earned and required of the employee during his or her final compensation period, that was not the result of "swapped time," and that was regularly applicable to the class of employees of which the employee is a member.

Basis of Judge Flinn's Decision on Vacation Sale.

Judge Flinn based his ruling regarding vacation sale upon a legal doctrine called equitable estoppel. The doctrine of equitable estoppel prevents a party from making an allegation or a denial that contradicts what that party has previously stated as the truth. Judge Flinn ruled that equitable estoppel prevents ("estops") CCCERA from applying PEPRA's restrictive definitions of "compensation earnable" to any CCCERA member who relied upon the advice and decisions of CCCERA in its Final Compensation Policy, and who would be "injured" by the new PEPRA rules on compensation earnable.

Judge Flinn defined an "injured party" as any CCCERA member who prior to PEPRA relied upon the CCCERA Final Compensation Policy to accumulate vacation to be sold for purposes of determining the member's retirement allowance beyond the amount the employee could earn during his or her final compensation period.

Basis of Judge Flinn's Ruling on Terminal Pay.

Judge Flinn held that the expectations of active employees who did not retire prior to January 1, 2013, but who simply expected to receive terminal pay when they retired,

[3] See footnote No. 2.
[4] See footnote No. 2.

do not rise to the level necessary to establish an "injury" sufficient to invoke the doctrine of equitable estoppel.

Basis of Judge Flinn's Ruling on On-Call, Stand By, and Call Back Pay.

Judge Flinn held that when an active employee who did not retire prior to January 1, 2013, performs on-call, standby, or call back work that is required as a part of the employee's job, and that required work applies generally to all employees in the class of which the active employee is a member, and that work is not the result of a voluntary swap of on-call, standby, or call back status with another employee, may count that pay in computing the employee's final compensation.

Judge Flinn's Ruling and Retirees.

Judge Flinn's decision applied directly only to active employees – the CCCERA members who were the subject of the October 30, 2012, action of the Retirement Board, However, it appears that the broad language and scope of the Court's definition of an "injured party" necessarily means that any person, not just current active employees, who meets the definition of an "injured party" would also be entitled to the same equitable protection.

Thus, it appears that any CCCERA member who retired prior to January 1, 2013, is also protected by equitable estoppel as to vacation sales that exceeded the amount of vacation that the retiree earned during his or her final compensation period, and that employee may retain the pension amount he or she was awarded based on this compensation earnable under the CCCERA Final Compensation Policy of December 5, 1997.

Judge Flinn's conclusion that an active employee who did not retire prior to January 1, 2013, had only a speculative expectation of being able to count terminal pay in computing his or her Final Compensation, clearly does not apply to employees who actually retired prior to January 1, 2013, because those persons actually did rely upon the terminal pay provision of the CCCERA Final Compensation Policy of December 5, 1997.

Judge Flinn DID apply equitable estoppel principles to allow terminal pay to be counted by Merced County employees who actually relied upon a litigated judgment in that county, saying that their reliance is "similar to that of those who relied upon being encouraged to take a cash out in their final compensation period and they are entitled to be similarly protected."

It appears that Contra Costa retirees who actually relied upon the terminal pay provision of the CCCERA Final Compensation Policy of December 5, 1997, and of two litigated civil settlements, *Paulson v. CCCERA*, and *Walden v. CCCERA,* in deciding to give up their jobs and retire, are like the Merced employees, and therefore would be entitled to the protection of the equitable estoppel doctrine regarding their terminal pay.

Finally, it seems apparent that Contra Costa retirees who actually relied upon the CCERA Final Compensation Policy in including on-call, standby, or call back compensation in their final compensation when they decided to give up their jobs and retire, would also be entitled to the protection of the equitable estoppel doctrine regarding their on-call, standby, and call back compensation.

CCCERA's Implementation of Judge's Flinn's Decision.

On June 30, 2014, the Court of Appeal rejected requests to extend the stay in this case past July 11, 2014. As a result CCCERA has applied PEPRA standards and rules to all persons who retired on or after July 12, 2014.

In May 11, 2014, the CCCERA Board of Retirement issued a statement announcing its intention to review retirement calculations of some CCCERA members who had already retired prior to July 12, 2014. Here is that statement:

> "The CCCERA Board of Retirement has a fiduciary obligation to pay only the legally correct benefits earned by its members. Having recently been granted additional auditing authority and responsibility by the State Legislature, the Board announces its intention to review past retirement calculations to determine whether any retired CCCERA members may be receiving benefits that were calculated on amounts that should not have been included in their pensionable compensation. As a first step, the Board will conduct an analysis of data pertaining to all unusual increases in the final average salary year for all CCCERA members who retired during the past several years."
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> "The Board assures all CCCERA members that any proposed adjustments to retirement benefits will occur only after the Board has conducted a thorough examination of all applicable facts and applicable law, and only after affording any affected members the opportunity to appear before, and present their positions to, the Board before any action is taken."

On July 9, 2014, the CCCERA Board of Retirement was asked to issue a second statement to clarify its intention in issuing its May 11th statement. The proposed second statement read, in part:

> "In order to assist members to clearly understand the intent of the CCCERA Board of Retirement in its May 07, 2014, "Statement of Board Intent to Review Past Incidents of Unusual Compensation Increases At End of Employment," the Board assures CCCERA members that it will not be reviewing past retirement calculations based upon normal vacation and compensatory time sales, normal pay for on call work that was regularly required and ordinarily worked by everybody in the same job classification during the same time period, or terminal pay which was comprised of benefits ordinarily earned or permanent and reoccurring, each of which was credited to a member's compensation earnable pursuant to and in compliance with the Board's Final Compensation Policy dated December 05, 1997."

The Retirement Board voted to reject this proposed second statement. Several Retirement Board members stated that retiree leaders could tell their members, if they choose to do so, what they believe is the intent and the meaning of the CCCERA Retirement Board's Statement of May 7th.

On July 23, 2014, the CCCERA Retirement Board unanimously adopted a second statement to clarify its intention in issuing its May 11th statement. The July 23rd CCCERA Board statement read as follows:

> ""The Board's intent is to scrutinize apparently intentional acts of pension spiking, through members' receipt of pay items that were not earned as part of their regularly recurring employment compensation during their careers. The Board directs staff to concentrate on specific, unique items of pay and not on regularly recurring vacation, sick or compensatory leave time."

Appeals of Judge Flinn's Judgment.

May 28, 2014 – Appeals from Judge Flinn's Rulings. Alameda County Deputy Sheriff's Association et al. v. Alameda County Employees' Retirement Assn. and Bd. Of the Alameda County Employees Retirement Assn. et al.

Judge Flinn's judgment became final on May 12, 2014. Numerous parties to the case appealed the judgment to the First District Court of Appeal. The case was assigned to Division Four of First District Court of Appeal. Because the Alameda County Deputy

Sheriff's Association filed the first appeal of Judge Flinn's judgment, the official name of the case on appeal is titled *Alameda County Deputy Sheriff's Association et al. v. Alameda County Employees' Retirement Assn. and Bd. Of the Alameda County Employees Retirement Assn. et al.*

Thereafter, at least twelve other parties, including the State of California as an intervenor, filed appeals from Judge Flinn's judgment. The Contra Costa County Deputy Sheriff's Association's appeal was filed on June 3, 2014.

The appeals from Judge Flinn's rulings produced numerous legal briefs in the Court of Appeal, and the case remained in the First District Court of Appeal for more than three and one-half years before the Court of Appeal heard oral argument on December 12, 2017.

January 9, 2018 - Court of Appeal Opinion in *Alameda County Deputy Sheriff's Association et al v. Alameda County Employees' Retirement Association et al* [*Alameda DSA*].

On January 9, 2018, Division Four of the First District Court of Appeal issued a published opinion in *Alameda DSA* that protects promised pension benefits for all "legacy" public employees in Alameda, Contra Costa and Merced counties. "Legacy employees" are employees who were hired prior to January 1, 2013.

The retirement systems in Alameda, Contra Costa and Merced counties had implemented PEPRA's exclusion of some pay items from the calculation of pension benefits for new and "legacy" employees. The "legacy" employees in these three counties, however, had been promised pension benefits that were calculated by including these pay items prior to the time that PEPRA eliminated them from pension calculations.

The *Alameda DSA* Court of Appeal opinion held that some pay items included in computing employees' final compensation were vested and protected by the "California Rule," but leave cash outs provided at the time of retirement, also known as terminal pay, are not vested pension rights.

However, the Court of Appeal concluded that principles of equity "tip decidedly in favor" of legacy employees who had been promised and credited with terminal pay in the calculation of their pension benefits. The Court concluded that the doctrine of equitable estoppel prevents County governments and retirement systems from reneging on the promises they had made to those employees to include those pay

items in calculating final compensation upon retirement. The Court of Appeal held that all "legacy employees" are entitled to include terminal pay in calculating their pensions, as long as that terminal pay had been designated as pensionable by Settlement Agreements entered into after the *Ventura* decision.

Finally, the Court of Appeal in *Alameda DSA* declined to follow the decision of Division Two of the First District Court of Appeal in *MAPE (Marin Association of Public Employees) v. Marin County Employees Retirement Association,* No. A139610, 2 Cal.App.5th 674 (August 17, 2016), which had reached a contrary result.

MAPE v. Marin held that the State Legislature could lawfully pass the Public Employees' Pension Reform Act of 2012 (PEPRA) to retroactively reduce promised pension benefits for public service employees who had retired after December 31, 2012.

The *MAPE* Court of Appeal held that while a public employee has a vested right to a pension, that right is only to a "reasonable pension," not a fixed entitlement to the most optimal formula for calculating the pension. MAPE held hat the Legislature may, prior to an employee's retirement, alter the formula for calculating a pension, thereby reducing the anticipated pension, as long as the altered formula does not deprive an employee of a "reasonable pension."

Appeals to the California Supreme Court.

September 26, 2016 – *MAPE v. Marin.* On September 26, 2016, the Marin Association of Public Employees petitioned the California Supreme Court to review the *MAPE* decision of the Court of Appeal. On November 22, 2016, the Supreme Court granted review in *MAPE* and ordered that briefing in the case be deferred pending the decision of the Court of Appeal in *Alameda DSA v. Alameda County Retirement Association*. The Supreme Court has not yet ruled on the request by numerous plaintiffs that the opinion of the Court of Appeal be depublished.

February 16, 2018 – *Alameda County DSA v. Alameda County Retirement Association.* On February 16, 2018, the Alameda County DSA petitioned the California Supreme Court to review the Alameda DSA case.

March 28, 2018. On March 28, 2018, the Supreme Court granted review in *Alameda County DSA v. Alameda County Retirement Association.* The Supreme Court also denied the request made by the State of California that the opinion of the Court of Appeal in *Alameda DSA* be depublished.

Interestingly, on the same day that the Court granted review in *Alameda DSA,* March 28, 2018, the Supreme Court also issued an order in *Mape v. Marin* (repeating its order of November 22, 2016) deferring further action and additional briefing in *Mape v. Marin* pending disposition of the *Alameda DSA* case. The Court appears to have decided to use the *Alameda DSA* case to resolve all of the issues raised by both cases.

Cal Fire v. CalPERS.

In 2003 the Legislature enacted a state law allowing some public employees the option to purchase at cost up to five years of nonqualifying service credit (called "airtime). In 2012 the Legislature eliminated this option when it enacted PEPRA. On July 12, 2013, Cal Fire Local 2881 filed a petition for writ of mandate to require CalPERS to allow its members to purchase airtime service. The Alameda Superior Court denied the petition, concluding that the elimination of the option of a state employee to purchase "airtime" did not impair or violate any pension right of the plaintiffs. The Cal Fire petitioners appealed the denial of their petition to the Court of Appeal. On December 30, 2016, the Court of Appeal filed a published opinion entitled *Cal Fire Local 2881 v. California Public Employees' Retirement System,* affirming the denial of the petition for writ of mandate and injunctive relief.

On February 8, 2017, the Cal Fire petitioners petitioned the California Supreme Court to review the case. On April 12, 2017, the California Supreme Court granted the petition for review (S239958), but the Court did not defer briefing. The Court further denied a request for an order directing that the published opinion of the Court of Appeal be depublished. As of April 17, 2018, the case is fully briefed, but it has not yet been set for oral argument in the Supreme Court.

The Future of Public Employee Pension Litigation.

It is probable that the Supreme Court's resolution of *Alameda DSA v. Alameda,* and *MAPE v. Marin,* will probably not occur until sometime in 2019 or 2020.

It is also likely that the California Supreme Court will resolve the *Cal Fire* case at an earlier date.

The Reach of these Cases.

These appellate cases will directly affect only those CCCERA members who had not retired prior to January 1, 2013. CCCERA members who had already retired on the

effective date of PEPRA (January 1, 2013) are reasonably safe from any cuts to their pensions resulting from changes in the law enacted by PEPRA.

A Supreme Court decision in favor of CCCERA members who were employed prior to January 1, 2013, but who retired after that date will probably force CCCERA to apply the pension calculation formula of the CCCERA Final Compensation Policy of December 5, 1997, to them. A negative decision of the Supreme Court will probably mean that these members of CCCERA will be subject to the present CCCERA Final Compensation Policy.