

SUPREME COURT COPY

In the Supreme Court of the State of California

Cal Fire Local 2881, et al.,

Petitioners and Appellants,

v.

**California Public Employees' Retirement
System (CalPERS),**

Defendant and Respondent,

and

The State of California,

Intervener and Respondent.

Case No. S239958

SUPREME COURT
FILED

OCT 26 2018

Jorge Navarrete Clerk

Deputy

First Appellate District Division Three, Case No. A142793
Alameda County Superior Court, Case No. RG12661622
The Honorable Evelio Martin Grillo, Presiding Judge

INTERVENER AND RESPONDENT STATE OF CALIFORNIA'S SUPPLEMENTAL BRIEF PURSUANT TO RULE 8.520(d)

PETER A. KRAUSE
Legal Affairs Secretary
*REI R. ONISHI
Deputy Legal Affairs Secretary
State Bar No. 283946
Office of Governor
Edmund G. Brown Jr.
State Capitol, Suite 1173
Sacramento, CA 95814
(916) 445-0873
Rei.Onishi@gov.ca.gov
*Attorneys for Intervener and
Respondent State of California*

Pursuant to rule 8.520, subdivision (d), of the California Rules of Court, Intervenor and Respondent State of California respectfully submits this brief in response to the supplemental brief filed by Petitioners Cal Fire Local 2881 and several of its members (together, the Union) on October 5, 2018 regarding recently enacted legislation.

Senate Bill No. 1085 (Stats. 2018, ch. 893, § 1) requires a public employer to grant a public employee's request for a reasonable leave of absence so that the employee may "serve as [a] steward[] or officer[]" of the employee's union. During the leave of absence, which may be granted on "a full-time, part-time, periodic, or intermittent basis," the employee is entitled to full compensation and benefits, including "full service credit."¹

The Union argues that this service credit provision is analogous to the airtime purchase offer, and shows that the Governor and Legislature do not object to awarding service credit for time spent outside of state service. According to the Union, the State's argument that ending the sale of airtime was necessary to restore the link between public service and pension benefits is nothing more than a "purely opportunistic" "litigating position." (Union's Suppl. Br. 3.)

The Union's analogy is false, and its attacks on the State specious. The distinguishing characteristic of airtime is that it was credited to an employee in exchange for a cash payment. That is precisely why it was called *air-time*—the service credit purchased by an employee did not reflect or correspond to any actual service. (Answer Br. 15.) To restore the link between public service and pension benefits, the Legislature needed to

¹ The employee continues to pay his or her member retirement contributions during the leave of absence, while the employee's union reimburses the employer for all employer retirement contributions, unless otherwise provided by a collective bargaining agreement.

end this scheme, and did so in a limited manner that protected the rights of those who already had paid for it. (See *id.* at pp. 45-47, 53.)

There is no inconsistency between ending the sale of airtime and authorizing service credit under SB 1085. Unlike airtime, the service credit authorized under SB 1085 directly corresponds to time *actually served* representing one's fellow employees and attempting to facilitate peaceful and fruitful employer-employee relations—"endeavors" that the Union itself asserts "are quintessentially public service," significantly benefitting employers and society at large alike. (Union's Suppl. Br. 3.) Airtime, in contrast, corresponds to *no* public service. It is simply purchased through a financial transaction—time for money. The Union's false analogy thus misconstrues the distinction between airtime and legitimate, earned service credit like that permitted by the Legislature under SB 1085.²

The Union's argument also mischaracterizes the State's position. In its Supplemental Brief, the Union suggests that the State has argued that "the theory of a pension system . . . require[s] that pension service credit be exclusively linked to time spent working for the State." (Union's Suppl. Br. 3.) This is incorrect. As stated in its Answer Brief, the State's position is that the theory of a pension system requires pension service credit be *earned* through *public* service, not through service to the State of California exclusively. (Answer Br. 45-47.) Because it corresponds to no public service and is simply purchased in exchange for cash, airtime severs the

² The Union insists that airtime—despite not corresponding to actual service—still reflects government service because employees only become eligible to purchase it after five years of service. However, the Union confuses an eligibility requirement for consideration. (Answer Br. 27.) Employees receive service credit for their first five years, regardless of whether they purchase airtime. The additional service credit that an employee is purchasing is for *fictional* years, separate from any years of public service.

link between work performed and pension benefits. Recognizing this, the Governor and Legislature ended the sale of airtime, and the Court of Appeal properly upheld the legislative decision to protect the integrity of public pension systems.

Dated: October 25, 2018

PETER A. KRAUSE
Legal Affairs Secretary

A handwritten signature in black ink, appearing to read "Rei Onishi". The signature is fluid and cursive, with a long horizontal stroke at the end.

REI R. ONISHI
Deputy Legal Affairs Secretary
*Attorneys for Intervener and
Respondent State of California*

CERTIFICATE OF COMPLIANCE

I certify that the attached Intervener and Respondent State of California's Supplemental Brief uses a 13-point Times New Roman font and contains 661 words.

Dated: October 25, 2018

PETER A. KRAUSE
Legal Affairs Secretary

A handwritten signature in black ink, appearing to read "Rei Onishi". The signature is written in a cursive style with a long horizontal stroke at the end.

REI R. ONISHI
Deputy Legal Affairs Secretary
*Attorneys for Intervener and
Respondent State of California*

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Cal Fire Local 2881 v. California Public Employees' Retirement System**
No.: **S239958**

I declare: I am employed in the Office of Governor Edmund G. Brown Jr. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of Governor Brown for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of Governor Brown is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 25, 2018, I served the attached **INTERVENER AND RESPONDENT STATE OF CALIFORNIA'S SUPPLEMENTAL BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of Governor Brown at State Capitol, CA 95814, addressed as follows:

Gary M. Messing
Gregg McLean Adam
Messing Adam & Jasmine LLP
235 Montgomery Street, Suite 828
San Francisco, CA 94104

Clerk
California Court of Appeal
First Appellate District, Division 3
350 McAllister Street
San Francisco, CA 94102

Preet Kaur
CalPERS Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707

County of Alameda
Administration Building
Superior Court of California
County Administration Building
1221 Oak Street
Oakland, CA 94612

Nelson R. Richards
California Attorney General's Office
2550 Mariposa Mall, Room 5090
Fresno, CA 93721

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 25, 2018, in Sacramento California.

Alexander Ritchie

Declarant

AOR Ritchie

Signature