

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALAMEDA COUNTY DEPUTY SHERIFFS' ASSOCIATION, et al.,
Plaintiffs and Appellants

vs.

ALAMEDA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION;
MERCED COUNTY EMPLOYEES' RETIREMENT ASSOCIATION
BOARD OF RETIREMENT OF THE MERCED COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION, et al.,
Defendants and Respondents,

**SUPREME COURT
FILED**

STATE OF CALIFORNIA,
Intervenor

APR 22 2019

Jorge Navarrete Clerk

On Review of a Decision by the Court of Appeal, First Appellate Division
Division Four, Case No. A141913; Contra Costa County Superior Court, Case
No. MSN12-1870 (coordinated with Alameda County Superior Court Case No.
RG12658890 and Merced County Superior Court Case No. CV003073);
Hon. David B. Flinn (Ret.), Judge

**RESPONDENTS MERCED COUNTY EMPLOYEES' RETIREMENT
ASSOCIATION (MCERA) AND MCERA BOARD OF RETIREMENT'S
SUPPLEMENTAL BRIEF (CRC RULE 8.520, SUBD. (D))**

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Respondents Merced County Employees' Retirement Association ("MCERA") and its Board of Retirement ("MCERA Board") (collectively, "Merced CERA") submit this Supplemental Brief as permitted by California Rule of Court rule 8.520, subdivision (d).

On March 4, 2019, this Court issued *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2019) 6 Cal.5th 965 ("*CalFire*"). *CalFire* is new, and applicable, authority that was not available in time to be included in MercedCERA's Answer Brief that was timely filed on July 19, 2018.

In *CalFIRE*, this Court provided a comprehensive analysis of the predicates to determining whether a particular employment or pension benefit is "vested," and thus constitutionally protected, under California law. The *CalFIRE* Court unanimously concluded that "California's public employees have never had a contractual right to the continued availability of the opportunity to purchase ARS credit." (*CalFIRE, supra*, 6 Cal.5th at p. 993.) Accordingly, the Court stated that its decision "expresses no opinion on the various issues raised by the state and amici curiae relating to the scope of the California Rule."

Similarly here, for all of the reasons already set forth in MercedCERA's Answer Brief but without the benefit of the legal framework explained in *CalFIRE*, Merced CERA contends that, on and after January 1, 2013, its active members did not have a constitutionally protected contractual right to have *future* compensation paid to them for services they would render outside of normal working hours included in their *future* "compensation earnable" determined by the MCERA Board under Government Code section 31461. That pay consists of standby, on-call and similar pay items ("On-Call Pay"), which are identified in MCERA Board

policies and resolutions as Pay Codes 301, 302, 306, 307 and 408. Nor do MCERA members who first join the retirement system on and after February 8, 2018, have a constitutionally protected contractual right to have any terminal pay accrued after that date included in their future retirement allowance calculations. That pay is identified in MCERA Board policies and resolutions as Pay Codes 350, 351 and 352.

The *CalFire* Court observed that “the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the [governmental body]. [Citation.] Policies, unlike contracts, are inherently subject to revision and repeal” [Citing *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171 [134 Cal. Rptr. 3d 779, 266 P. 3d 287].” (*CalFire, supra*, 6 Cal.5th at pp. 977-978.) The same is even more true with respect to *public retirement board policies and resolutions* that reflect policy decisions authorized by such statutes. Public retirement boards must have the legal authority to change their discretionary determinations regarding pensionability of pay that will be earned in the future in a manner that is consistent with the applicable statutes and complies with the boards’ fiduciary responsibilities of prudence and loyalty.

The *CalFIRE* Court also observed that “unlike core pension rights, the opportunity to purchase ARS credit was not granted to public employees as deferred compensation for their work.” (*Id.* at p. 971.) Similarly, in this case, the opportunity to have pay that employee receive on or after January 1, 2013, for “services rendered outside of normal working hours,” and for leave that “exceeds that which may be earned and payable in each 12-month period during the final average salary period,” was not granted to public employees as deferred compensation for their work rendered after the Legislature

amended Government Code section 31461, effective January 1, 2013. That pay, almost by definition, is beyond the ordinary work upon which the retirement allowance is to be based and for which compensation has been deferred in a constitutional sense prior to January 1, 2013. Those non-core payments should therefore also be able to be constitutionally excluded from prospective final compensation periods by Government Code section 31461, subs. (2), (3) and (4).

Because the answer to the first question posited by the *CalFIRE* Court should be answered in the negative in this case as well, Merced CERA submits that — just as it concluded in *CalFIRE* — the Court also need not consider the second question regarding application of the “California Rule,” as described therein.

Under the authority provided by *CalFIRE* and as discussed at length in Merced CERA’s Answer Brief, this Court should affirm the constitutionality of the compensation earnable amendments, facially and as applied by Merced CERA.

Dated: April 17, 2019

Respectfully submitted,

NOSSAMAN LLP

By /s/ Ashley K. Dunning
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Attorneys for Respondents
Merced County Employees’
Retirement Association and Board of
Retirement

CERTIFICATE OF COMPLIANCE
California Rules of Court, Rule 8.520(c)(1)

Pursuant to California Rules of Court, Rule 8.204 and 8.520(c)(1), the foregoing RESPONDENTS MERCED COUNTY EMPLOYEES' RETIREMENT ASSOCIATION (MCERA) AND MCERA BOARD OF RETIREMENT'S SUPPLEMENTAL BRIEF (CRC RULE 8.520, SUBD. (D)) is double-spaced and was printed in proportionately spaced 13-pt. Times New Roman type. It is 3 pages long (inclusive of footers but exclusive of the cover page, tables, the Certificate of Compliance, and the Certificate of Service); it contains 1,028 words.

Executed this 17th day of April, 2019, at San Francisco, CA 94111.

Ashley K. Dunning
Ashley K. Dunning

CERTIFICATE OF SERVICE

I am employed in the City of San Francisco, State of California. I am over 18 years of age and not a party to this action. My business address is Nossaman LLP, 50 California Street, 34th Floor, San Francisco, CA 94111.

On April 17, 2019, I served the foregoing **RESPONDENTS MERCED COUNTY EMPLOYEES' RETIREMENT ASSOCIATION (MCERA) AND MCERA BOARD OF RETIREMENT'S SUPPLEMENTAL BRIEF (CRC RULE 8.520, SUBD. (D))** on parties to the within action as follows:

(By Electronic Service via TrueFiling) On the same date, I caused the document(s) to be sent to the attorneys identified below at the electronic notification addresses listed with the TrueFiling Servicing.

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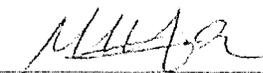
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Executed on April 17, 2019

- (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
- (FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



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I declare under penalty of perjury that the foregoing is true and correct.

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