First District Court of Appeal Speaks Again on Vested Rights as it Upholds the Constitutionality of PEPRA's Elimination of "Airtime" Service Credit Purchases

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On December 30, 2016, Division Three of the First District Court of Appeal (DCA) issued a unanimous published decision in *Cal FIRE Local 2881, et al. v. CalPERS, et al*. (Dec. 30, 2016, A142793) (*CalFIRE* Decision) upholding the constitutionality of yet another aspect of the Legislature's Public Employees' Pension Reform Act of 2013 (PEPRA) that applies to legacy, as well as new members of all public retirement systems in California that are subject to its mandates.

Specifically, the Court held that the Legislature did not violate the vested constitutional rights of public retirement system members when it prohibited, on and after January 1, 2013, the continuation of programs that had permitted retirement system members who had earned at least five years of retirement service credit to purchase another up to five years of nonqualified retirement service credit (sometimes referred to as airtime credit).

Airtime credit purchases were permitted under a statute applicable to members of the California Public Employees' Retirement System (CalPERS) as well as members of certain other, but not all, public retirement systems in California. Its elimination may mean little to most retirement system members, many of whom never worked under a plan that permitted its purchase. The manner in which the First DCA concluded that the benefit may be eliminated prospectively is potentially, however, important for all public retirement system members in California. For, the Court's analysis addresses much broader legal principles, which may apply beyond this particular benefit depending upon the facts of, including the legislative history regarding, each benefit at issue.

As the First DCA stated in the *CalFIRE* Decision: The overarching issue in this appeal relates to the proper construction of [the airtime service credit purchase statute] and, more specifically, whether the Legislature intended upon its enactment in 2003 to bestow upon plaintiffs and other CalPERS members a vested contractual right to purchase airtime service credit. With this analysis that focuses on Legislative intent at the time the statute was enacted, the Court followed a line of reasoning that the California Supreme Court explored at great length in its consideration of retiree health benefit protections under the California Constitution in *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1186, 1189 [*Retired Employees Assn.*]. The Court in CalFIRE then concluded, as had the trial court, that there is nothing in either the text of the statute [citation omitted], or its legislative history, that unambiguously states an intent by the Legislature to create a vested pension benefit. This demonstration of intent, as we explained above, is required by California law.

Rather, the Court in *CalFIRE* determined that by providing the option to purchase service credit provision to CalPERS members, the Legislature had not promised retirement system members not to modify or eliminate the option to purchase service credit, particularly in light of the legal presumption against the creation of a vested contractual right. The Court reached this conclusion notwithstanding its recognition that a CalPERS' publication entitled *Vested Rights of CalPERS Members: Protecting the Pension Promises Made to Public Employees* stated otherwise.

After its significant discussion of the importance of discerning Legislative intent when considering the scope of vested rights, the Court then launched into the second most important aspect of the decision: its endorsement, and adoption, of the legal analysis provided by the Third Division's colleagues in the Second Division of the First DCA in *Marin Assn. of Public Employees [MAPE] v. Marin County Employees' Retirement Assn*. ((2016) 2 Cal.App.5th 674, 702, review granted November 22, 2016, see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e)) (the *MAPE* Decision).

Namely, the Third Division agreed with the Second Division that even if a benefit right (here, to purchase airtime credit) were deemed to be vested as to current employees in perpetuity, a comparable new benefit was not *required* to be provided to any alleged disadvantaged legacy members if that right were eliminated. In so concluding, the Third Division also concluded that the correct statement of law on the comparable new benefit point is that a reasonable modification to a member's pension rights bearing a material relation to the theory of a pension system and its successful operation is constitutionally permissible, and that a comparable new benefit merely should, rather than must, be provided if an impairment was found.

Next, the Court observed that when the Legislature eliminated the airtime credit purchase program, it provided members with a seven month window during which they could submit an application to CalPERS to purchase the service credit, and that such applications would be honored if they were submitted prior to December 31, 2012. The Court noted:

Thus, nothing in the revised statutory scheme immediately destroyed plaintiffs' right to purchase the airtime service credit; rather, the revised scheme set forth a deadline by which plaintiffs had to exercise this right in order to avoid losing it. To the extent plaintiffs lost out on the opportunity to purchase the airtime service credit, such loss was, accordingly, a product of their own doing.

Further, the Court concluded that when the program was initiated, the cost of airtime service credit was to be borne entirely by the purchasing members, rather than by their employers, such that it was cost neutral. The program was widely criticized, however, as having resulted in additional costs to employers. And, the

Court noted, Governor Brown's 12 Point Plan that led to PEPRA included the elimination of airtime service credit purchase rights prospectively. The Court thus stated:

[W]e agree with the trial court that, while the airtime service credit clearly provided something valuable for those state employees choosing to purchase it, the fact remains that the employees, not the state, paid for this benefit. . . . As such, contrary to the arguments of plaintiffs and their amicus curiae, this simply is not a case where the state provided a retirement benefit to its employees in exchange for their work performance, and then took the benefit away, despite the employees' continued service, without offering a comparable benefit.

The foregoing conclusion will distinguish airtime service credit from other retirement benefits for which the employer has committed to continue contributing funds to support the promised benefits.

Finally, and perhaps most significantly from the perspective of potential future legal developments, the Court then specifically endorsed Division Two's recent discussion of the inherent implied authority of a Legislature to make reasonable alterations, changes, and modifications, in retirement benefit plans that result in reducing or eliminating certain aspects of a retirement benefit, so long as they apply to *active*, not retired or deferred, employees, and so long as they do not destroy an employee's anticipated pension. The Court concluded:

While plaintiffs may believe they have been disadvantaged by these amendments, the law is quite clear that they are entitled only to a reasonable pension, not one providing fixed or definite benefits immune from modification or elimination by the governing body. (*Kern, supra*, 29 Cal.2d at pp. 854-855.) Plaintiffs have made no showing that, following the elimination of their right to purchase airtime service credit, their right to a reasonable pension has been lost. (*See Marin Assn. of Public Employees*, supra, 2 Cal.App.5th at p. 707 [Repeated invocation of the inviolability of their 'vested rights' cannot substitute for analysis of just how the change to [the statutory law] demonstrates that employees will not retire with a 'substantial' or 'reasonable' pension], review granted November 22, 2016, see Cal. Rules of Court, rules 8.1105(e)(1)(B), 8.1115(e).)

As the Third District referenced in its recitations to the *MAPE* Decision, the California Supreme Court has already granted review of that decision. The grant of review came, however, with a somewhat unusual twist: the Supreme Court postponed briefing to it in *MAPE* pending either a decision from Division Four of the First DCA in another case involving similar legal issues impacting three county retirement systems whose cases were consolidated (Alameda, Contra Costa and Merced) (*Alameda County Deputy Sheriff's Ass'n et al. v. ACERA et al* (Case No. A141913) (*Consolidated Cases*), or further ordered of the Supreme Court.

Given the Supreme Court's decision to wait on Division Four's ruling in the *Consolidated Cases*, all eyes will now be on Division Four as it next tackles the intersection of vested right law in California and PEPRA's amendments that impact legacy, rather than simply post-PEPRA new, members of public retirement systems in California. The *Consolidated Cases* matter is fully briefed and, absent a request for supplemental briefing from Division Four, should be set for hearing and likely decided during the first half of 2017.

Meanwhile, in light of the 2015 change in the California Rules of Court permitting cases that have been granted Supreme Court review to continue to be cited by other courts pending their review, the *MAPE* Decision may continue to be cited by other courts, as it was in *CalFIRE*, as persuasive, though not binding, authority unless the Supreme Court orders otherwise.

It remains to be seen whether appellants in the *CalFIRE* case will also petition for California Supreme Court review.

The only certainty at this point is that the law of vested rights in California will continue to develop as challenges to PEPRA make their way through the courts. It may take some interesting turns during the coming year.