



1400 K Street, Suite 400 • Sacramento, California 95814
Phone: 916.658.8200 Fax: 916.658.8240
www.cacities.org

July 29, 2016

The Honorable Brad R. Hill, Presiding Justice
The Honorable Gene M. Gomes, Associate Justice
The Honorable Herbert I. Levy, Associate Justice
California Court of Appeal, Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

Re: Request for Partial Publication of Opinion Filed July 11, 2016
County of Tulare v. Public Employment Relations Board (Service Employees International Union Local 521)
Case No. F071240

Dear Presiding Justice Hill and Associate Justices Gomes and Levy:

Pursuant to California Rules of Court, rule 8.1120, the League of California Cities and the California State Association of Counties respectfully request that the Court publish section III¹ of its July 11, 2016 opinion in *County of Tulare v. Public Employment Relations Board (Service Employees International Union Local 521)*, Case No. F071240 (Opinion).

The League of California Cities (League) is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors

¹ There are two sections III in the Opinion. The League and CSAC request publication of the section III entitled “Discussion of Vested Rights.”

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a Litigation Coordination Program, which is administered by the County Counsels' Association of California, and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this is a matter with the potential to affect all California counties.

The County of Tulare explains in great detail in its July 27, 2016 Letter Requesting Partial Publication why the standards set forth in California Rules of Court, rule 8.1105(c) are met, and the League and CSAC do not seek to duplicate the points already raised.² The League and CSAC request publication of section III of the Opinion for the same reasons stated by the County – that is, publication of section III of the Opinion is warranted because it (1) explains an existing rule of law by clarifying that different rules apply to vesting of pension and non-pension benefits and (2) involves a legal issue of continuing public interest – the issue of constitutionally vested rights to employment benefits. The League and CSAC further agree with the County that publication of section III of the Opinion is necessary to fully effectuate the Court's modification of PERB's decision.

The stakes are enormous for the League and CSAC's members when it comes to judicial determinations of the circumstances under which public employees may acquire constitutionally-protected, vested rights to benefits that cannot be changed except under limited circumstances. Employee compensation and benefits comprise a significant component of city and county budgets statewide, and it assists all parties involved – the city or county employer, the union, the city or county employees, and the public – to understand whether and how those benefits may become vested.

The League and CSAC, therefore, respectfully request that the Court publish section III of the Opinion for the reasons set forth by the County in its July 27, 2016 Letter Requesting Partial Publication.

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² A copy of the County of Tulare's July 27, 2016 Letter Requesting Partial Publication is attached for the Court's convenience. In the interest of efficiency and economy, the League and CSAC hereby incorporate by reference the arguments set forth in that Letter.

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Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Corrie Manning".

Corrie Manning, SBN 278073

Sr. Deputy General Counsel, League of California Cities
Attorney for the League of California Cities
and the California State Association of Counties

CM:jl

Attachment: County of Tulare's July 27, 2016 Letter Requesting Partial Publication
of the Opinion dated July 11, 2016

Attachment

County of Tulare's July 27, 2016 Letter Requesting
Partial Publication of the Opinion dated July 11, 2016



Renne Sloan Holtzman Sakai
Public Law Group®

555 Capitol Mall, Suite 600
Sacramento, CA 95814
t: 916.258.8800
f: 916.258.8801

July 27, 2016

ERICH W. SHINERS
(916) 258-8800
eshiners@rshslaw.com

The Honorable Presiding Justice Brad R. Hill
and Associate Justices
Court of Appeal, Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

Re: *County of Tulare v. Public Employment Relations Board (Service Employees International Union Local 521)*
Case No. F071240
Request for Partial Publication of Opinion filed July 11, 2016

Dear Presiding Justice Hill and Associate Justices Gomes and Levy:

Pursuant to California Rules of Court, rules 8.1120 and 8.1105(c), the County of Tulare (County) respectfully requests that the Court certify for publication section III of its July 11, 2016 opinion in the above-referenced case. Section III of the opinion meets the following standards for publication: (1) it explains an existing rule of law; and (2) it involves a legal issue of continuing public interest. (Cal. Rules of Court 8.1105(c)(3),(6).) Additionally, publication of section III is necessary to fully effectuate the Court's modification of Respondent Public Employment Relations Board's (PERB) precedential administrative decision in this case.

In section III of its opinion, the Court addressed whether County employees had a constitutionally vested right to flexible promotions and merit step increases. The Court concluded that PERB incorrectly applied California law in ruling on this issue in its administrative decision. Accordingly, the Court modified PERB's decision by deleting the section discussing constitutionally vested rights. The Court did not, however, order PERB to vacate its decision and issue a new decision without the vested rights section.

The County, like all public employers in California, has a strong interest in the law governing creation of a constitutionally vested right to a particular employment benefit. Additionally, as the Petitioner in this case, the County has an interest in ensuring that the Court's modification of PERB's decision is given full effect and made known to all public agencies, labor unions, and employees subject to PERB's jurisdiction.

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Section III explains an existing rule of law (CRC 8.1105(c)(3))

One basis supporting publication of section III is that it explains existing California law regarding the creation of a constitutionally vested right to a particular employment benefit. In section III, the Court reaffirmed the long-standing rule that a public employee obtains a vested right to a pension benefit on the day the employee begins performing services for the public employer. The Court went on to recognize that “nonpension employment benefits do not follow the same rule of vesting as pension rights.” As the Court explained, active employees (not retirees) have a right to receive a particular benefit only while the statute or collective bargaining agreement that created the benefit remains in effect. The Court further explained that benefits granted in a collective bargaining agreement may be renegotiated in subsequent agreements.

Section III of the Court’s opinion is significant because it explicitly recognizes that different rules apply to vesting of pension benefits and nonpension benefits. Courts tend to conflate the two rules, which has led administrative review and quasi-judicial bodies, such as PERB, to do the same. Publication of section III will help dispel this confusion and provide clarity as to when certain employment benefits may become vested.

Section III involves a legal issue of continuing public interest (CRC 8.1105(c)(6))

Another basis supporting publication of section III is that the issue of constitutionally vested rights to employment benefits is of great and continuing interest to public agencies, their employees, and public sector labor unions. A ruling that a public employer guaranteed a particular benefit to employees or retirees in perpetuity can have substantial consequences for the public fisc, particularly if the agency did not clearly intend to do so and thus has not budgeted for the benefit in the future. As a result, public agencies seek clear guidance from the courts as to when a vested right may be created.

In *Retired Employees Association of Orange County v. County of Orange* (2011) 52 Cal.4th 1171, the California Supreme Court set a high standard for finding a vested right to “ensure that neither the governing body nor the public will be blindsided by unexpected obligations.” (*Id.* at p. 1189.) Although section III does not apply *Retired Employees* to the facts of this case, its discussion of vested rights case law will assist public employers in avoiding the creation of vested rights where the employer does not intend to do so. Because section III makes a significant contribution to the developing law in this area, it should be certified for publication.

Publication is necessary to fully effectuate the Court’s modification of PERB’s decision

A final basis supporting publication of section III is that the Court did not order PERB to vacate the vested rights section of its decision but instead modified that section itself. Had the Court granted the County’s requested remedy of ordering PERB to vacate its decision and issue a

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new decision without the vested rights section, it would have been clear to all constituents and the public that PERB's vested rights discussion was no longer good law. Modification, on the other hand, allows PERB's original decision to remain available, thereby causing confusion as to the current state of the law.

On July 19, 2016, PERB's General Counsel informed the County and Real Party in Interest Service Employees International Union Local 521 that PERB will note on its website, and on the decision itself available on that website, that the vested rights section of the decision is deleted by order of the Court. In the County's view, this does not sufficiently effectuate the Court's order. First, there is no guarantee that the notation on PERB's website will be readily available to those utilizing one of the two major online legal research services, Westlaw and LexisNexis, rather than PERB's website. PERB's announced action will have no effect on the electronic versions of its decision on those platforms. Second, there is no foolproof method to Sheppardize PERB decisions. As a result, a researcher may not be able to easily learn that the vested rights section of PERB's decision is no longer good law. Publication of section III will greatly reduce the chances that the stricken portion of PERB's decision will be considered precedential by any future researcher, agency, or court. Thus, to fully effectuate the Court's order striking that portion, section III must be published.

For the foregoing reasons, the County of Tulare respectfully requests that the Court publish section III of its opinion in *County of Tulare v. Public Employment Relations Board (Service Employees International Union Local 521)*, Case No. F071240.

Sincerely,



Erich W. Shiners
Attorney for County of Tulare

PROOF OF SERVICE

State of California

County of San Francisco

Court of Appeal Case No.: F071240

I am not a party to the within action, am over 18 years of age. My business address is 350 Sansome Street, Suite 300, San Francisco, CA 94104. On July 27, 2016, I served **Request for Partial Publication of Opinion filed July 11, 2016**, by the method indicated below:

By Electronically mailing a true and correct copy through True Filing's electronic Mail system to the email addresses set forth below.	
J. Felix De La Torre, General Counsel Wendi L. Ross, Deputy General Counsel Laura Z. Davis, Sr. Regional Attorney Daniel M. Trump, Regional Attorney Public Employment Relations Board 1031 18th Street Sacramento, CA 95811-4124 Telephone: (916) 322-3198 email: fdelatorre@perb.ca.gov PERBLitigation@perb.ca.gov <i>Attorney for Respondent</i>	Kerianne R. Steele Anne I. Yen Weinberg, Roger & Rosenfeld 1001 Marina Village Parkway Suite 200 Alameda, CA 94501 Telephone: (510) 337-1001 email: ayen@unioncounsel.net ksteele@unioncounsel.net <i>Attorney for Service Employees International Union, Local 521</i>
Patrick Whitnell, General Counsel Corrine L. Manning, Deputy Gen. Counsel League of California Cities 1400 K Street, Suite 400 Sacramento, CA 95814 email: pwhitnell@cacities.org cmanning@cacities.org <i>Attorneys for Amicus Curiae</i>	

I declare, under penalty of perjury that the foregoing is true and correct. Executed on July 27, 2016, in San Francisco, California.



Rochelle Redmayne