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SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

December 28, 2012

Hon. Tani Cantil-Sakauye, Chief Justice
Associate Justices of the Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Request for Depublication
International Brotherhood of Electrical Workers, Local 1245 vs. City of Redding
Supreme Court Case No. S207278
Court of Appeal No. C067709 (Third District Nov. 2, 2012,
Justice Nicholson, Acting P.J., Justices Butz and Murray, concurring)

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Introduction

I write on behalf of the League of California Cities ("League") to urge the Supreme Court to order depublication of the opinion in the above-referenced matter pursuant to Rule of Court 8.1125. As set forth below, the opinion is imprecise, and will foster confusion over this Court's decision in *Retired Employees Association of Orange County v. County of Orange*, 52 Cal. 4th 1171 (2011) ("*REAOC*").

The Interest of the League (Rule 8.1125(a)(3))

The League of California Cities ("League") is a non-profit association of 480 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 being of great significance due to its potential impact on many California cities.

Many members of the League provide or subsidize in part health benefits for their retired, former employees. The outcome of this case could have a significant impact on numerous California agencies.

Why the Opinion Should Not be Published (Rule 8.1125(a)(3))

The stakes are enormous for local agencies with respect to retiree medical benefits, and whether reasonable modifications may be made and under what circumstances, or whether drastic service cuts or bankruptcy are the only viable options. Clearly mindful of this reality, this Court issued a thorough opinion in *REAOC,* and closely and thoughtfully examined California law concerning vested rights in the public sector. The Court articulated a number of rigorous standards that the Court believed "should ensure that neither the governing body nor the public will be blindsided by unexpected obligations." 52 Cal. 4th at 1189.

The criteria articulated by the Court include:

- Whether contract terms may be implied from express terms depends on whether the "language or circumstances accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature...." (52 Cal. 4th at 1177.)

- Statutes can constrain an agency's discretion. "[A] court must look to Board resolutions, including those resolutions approving or ratifying MOU's (see Gov. Code § 3505.1) to determine the parties' contractual rights and obligations." (52 Cal. 4th at 1185.)

- "[I]t is presumed that a statutory scheme is not intended to create private contractual or vested rights and a person who asserts the creation of a contract with the state has the burden of overcoming that presumption." (52 Cal. 4th at 1186.)

- "[T]he intention of the legislature…to create contractual obligations, resulting in extinguishment to a certain extent of governmental powers, must clearly and unmistakably appear…." (*Id.*)

- "the implication of suspension of legislative control must be 'unmistakable.'" (*Id.*)

- "A court charged with deciding whether private contractual rights should be implied from legislation … should 'proceed cautiously both in identifying a contract within the language of a … statute and in defining the contours of any contractual obligation….The requirement of a 'clear showing' that legislation was intended to create the asserted contractual obligation…should ensure that neither the governing body nor the public will be blindsided by unexpected obligations." (52 Cal. 4th at 1188-89.)

The court of appeal's decision does not carefully follow the Supreme Court's analysis, and depublication is warranted for the specific reasons that follow.

First, it must be noted that the decision was made without the benefit of oral argument, which would have provided an opportunity to refine the arguments. Further, because the decision was on an appeal from a sustained demurrer, the court of appeal did not have the benefit of a developed record – which is important for a comprehensive analysis as outlined by this Court in *REAOC*.

Second, all the court of appeal needed to say was that the pleadings were sufficient to overcome a demurrer, and that the case could proceed through discovery. Instead, the court of appeal made a number of imprecise statements, and mischaracterized the Court's decision in *REAOC*. Although the opinion s ates that *REAOC* was the "centerpiece" for its analysis (210 Cal. App. 4th at 1118), the court used only snippets from the *REAOC* opinion – snippets that will undoubtedly be held up as "holdings" in future cases, and which standing alone are misleading and incorrect.

For example, the court of appeal took language in a MOU, and proceeded to give it a "reasonable interpretation" – when there was no briefing based on a record, and no effort to follow the rigorous analysis required by REAOC. (210 Cal. App. 4th at 1120.) Based simply on the pleadings, the court of appeal jumped to reaching the merits, stating that "then active employees' vested right to future

retiree medical insurance premiums was legislatively authorized, expressly." *Id.* at 1121. And again, citing to *REAOC*'s holding that a MOU "may" created a vested right, the court of appeal appears to have summarily concluded, without the benefit of a record, that "the parties intended to a provide a future benefit to active employees...." (210 Cal.App.4th at 1121.)

One particularly dangerous statement in the opinion comes from a NLRB precedent, and not from *REAOC* - that rights "which accrued or vested under the agreement, will as a general rule, survive termination of the agreement." (210 Cal. App. 4th at 1119.) This is a very broad statement that does not cite to California law, and the statement is completely unnecessary to the court of appeal's central holding – that the pleading was sufficient to withstand a demurrer. In fact, courts interpreting California law do *not* broadly hold that "rights accrued" survive the termination of a labor agreement, but instead give effect to MOU durational clauses. For example, in *Harris, et al vs. County of Orange*, 682 F.3d 1126 (9th Cir. 2011), the court indicated that durational clauses in memoranda of understanding are evidence that benefits provided under the MOUs are *not* intended to survive the MOUs' expiration, and "cannot be the source of a claim that the benefits survive indefinitely."[1] *See also Retired Employees Association of Orange County, Inc. v. County of Orange*, 2012 U.S. Dist LEXIS 146637 (C.D. Cal. 2012) (noting that MOU durational language suggests that rights and benefits provided under the MOU do not survive expiration of the MOU).

Third, the court of appeal appears to have completely disregarded the City of Redding's statutory scheme for approval of "compensation." Section 2.80.010 of the Redding Municipal Code contains a limitation that protects the City. The limitation requires all compensation to be approved by resolution, meaning that the legislative record must be examined and analyzed in order to see if there is "clear showing" that the City Council intended to bind itself in the future. The court of appeal does not even mention this statutory limitation, and again, simply jumps to the conclusion that the MOU expressly intended to create a binding

[1] *Harris* is a companion case to *REAOC,* and addresses other vested rights issues raised in the Orange County Retiree Medical Plan.

commitment – a commitment that could stem through active employment and retirement, thus lasting over seventy years.

Many of the League's constituent cities and towns have municipal codes or charters that, like Redding, contain protections on how compensation is fixed and under what circumstances. *REAOC* properly directs courts to conduct a rigorous analysis of the legislative record, but the court of appeal's opinion here simply skips this analysis. The opinion thus creates a dangerous inference that a court can simply look to a memorandum of understanding, and not also look at the record accompanying the passage of the MOU as well as governing local law.

Conclusion

Courts must proceed cautiously and carefully in this evolving area of law involving vested rights and post employment benefit programs. The League is extremely concerned about the imprecise and broad-based statements made in the opinion. The opinion does not accurately observe *REAOC*'s analytical framework and it should be depublished.

Respectfully submitted,

Arthur A. Hartinger
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c: See Proof of Service, attached

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On December 28, 2012, I served true copies of the following document(s) described as **LOCC's REQUEST FOR DEPUBLICATION** on the interested parties in this action as follows:

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BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I

am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on December 28, 2012, at Oakland, California.

Kathy Thomas