

# Cal Fire Local 2881 v. California Public Employees' Retirement System (CalPERS)



## The California Supreme Court's Ruling

### *The Option to Purchase Airtime is Not a Vested Right and, Therefore, is Not Subject to the California Rule*

From 2003 until the Legislature enacted the California Public Employees' Pension Reform Act of 2013 (PEPRA), public employees enrolled in CalPERS for five years or more had the option to purchase up to five additional years of service credit. Once purchased, the additional service credit, commonly known as "airtime," increased the pension benefit the employees would receive upon retirement.

After PEPRA eliminated airtime, Cal Fire Local 2881 (the Union) filed a lawsuit, alleging that employees who were hired prior to PEPRA had acquired a contractually "vested right" to the airtime benefit. The Union argued that it was unconstitutional to prevent those employees from purchasing airtime at any time prior to retirement because of court precedent commonly referred to as the "California rule," which interprets the constitutional contracts clause to severely restrict any alteration of vested pension benefits.

The Union asked the court to compel CalPERS to continue to allow eligible employees hired prior to PEPRA to purchase airtime. However, the California Supreme Court declined to do so because it concluded that the option to purchase airtime was not a vested right. Since only vested rights are entitled to constitutional protection, the Court's conclusion resolved the case, and the Court decided it had no occasion to address the "California rule" or to opine on what constitutes an unconstitutional impairment of public employees' vested rights.

## The Court's Reasoning

### *Terms and Conditions of Public Employment Generally Are Not Protected by the Constitutional Contracts Clause*

In concluding that the option to purchase airtime was not a vested right, the Court affirmed the long-standing legal principle that terms and conditions of public employment are generally set by statute (or ordinance or resolution)

and not by contract, and therefore, can be modified at the discretion of the governing legislative body. In other words, public employees generally do not enjoy any constitutional contracts clause protection over the terms and conditions of their employment.

The Court even declared this principle to be unaltered by the growing prevalence of collective bargaining agreements in public employment. It noted that the terms and conditions of public employment "may be immune from legislative modification during the term of the express agreement," but not after the agreement expires, or as to terms and conditions that are not covered by the agreement.

The Court then acknowledged that there are two recognized exceptions to the general rule that the terms and conditions of public employment are not protected by the constitutional contracts clause. The first is where there is clear evidence in the language of the legislative enactment, or the circumstances surrounding its passage, that the legislative body intended to create contractual rights. The second is where contractual rights are implied as a result of the nature of the employment benefit, such as with "core" pension benefits that constitute deferred compensation. The Court concluded that the opportunity to purchase airtime did not fit within either of these exceptions.

### *There Was No Indication that the Legislature Intended to Create a Contractual Right to Purchase Airtime*

The Court explained that legislative enactments can create contractual rights expressly or impliedly, but in either instance, the intent to create contractual rights must be clear, because statutes are "inherently subject to revision and repeal." The Union argued that the airtime statute clearly intended to permit eligible employees to purchase airtime at any time prior to retirement because it stated that "a member may elect to receive [airtime] at any time prior to retirement by making the contributions as specified."

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Although the Court acknowledged the language could be interpreted as suggested by the Union when read in isolation, the Court noted that when read in context, the language simply specified the time during which employees could purchase airtime and that the election was not complete until payment had been made. The Court further reasoned that it would fly in the face of “the legal presumption against the creation of a vested contractual right” to convert the language into a promise by the Legislature not to modify or eliminate the option to purchase airtime.

## ***No Contractual Right to Purchase Airtime Could be Implied Because Airtime Could Not Be Considered Deferred Compensation***

The Court also explained that public employees can acquire an implied contractual right to employment benefits that constitute deferred compensation. Citing previous cases, the court recognized that pension benefits have been afforded constitutional protection as implied contractual rights that are a part of the compensation promised by the government to its employees, even though they are paid at a later time.

However, the Court concluded that the airtime benefit could not be considered deferred compensation, because it was not “earned” in connection with actual public service. The Court stated: “Pension benefits, the classic example of deferred compensation, flow directly from a public employee’s service, and their magnitude is roughly proportional to the time of that service.” In contrast, all eligible employees had the same opportunity to purchase airtime regardless of the time of their public service.

The Court was not persuaded by the Union’s contention that employees had to “earn” airtime by working for five years. Rather, the Court noted the five-year period simply ensured that the employee had established eligibility for a pension in the first place and also corresponded to the requirements of federal tax law.

## ***There Was No Other Basis to Conclude that the Option to Purchase Airtime Was Impliedly Protected by the Contracts Clause***

Finally, the Court dismissed a number of other potential legal theories for concluding that the option to purchase airtime was impliedly protected by the constitutional contracts clause.

For example, the Court was not persuaded by the Union’s argument that the airtime benefit should be afforded constitutional protection because it was an offer for a “unilateral contract” – meaning that the benefit was offered in exchange for the public employee’s service and, therefore, a contract was formed when employees effectively accepted the offer by entering or continuing in public service while the airtime statute was in effect. The Court found this argument to be inconsistent with the general rule that statutory terms and conditions of employment do not create contractual rights. It further noted that, even if it treated the airtime statute as an offer, the Union’s theory was not valid because there were two things employees had to do to accept the offer – (1) file a written election with the employee’s pension board and (2) make appropriate payments to the retirement system – and since the employees the Union was representing in the lawsuit had yet to make the written election or the payments, the offer was not accepted and the Legislature was entitled to revoke it by amending the statute to eliminate the benefit.

The Court also rejected the contention that a term and condition of public employment is entitled to constitutional protection under the contracts clause simply because it affects, in some manner, the amount of a pension benefit. In support of this holding, the Court cited two cases in which a benefit affecting the amount of a pension was held not to be vested. In one of the cases, the Court found a public employee had no vested right to remain in civil service until age 70, even though the mandatory retirement age was 70 when he began his employment, and the Legislature’s reduction of the mandatory age to 67 led to him receiving a smaller retirement allowance. The Court reasoned that the employee had no reasonable expectation of continuing in his employment until age 70, and, therefore, the benefit could not be considered deferred compensation.

The Court also rejected the Union’s argument that the airtime benefit should be considered vested because CalPERS once characterized it as such in a publication. The Court concluded that CalPERS’ “interpretations of the state Constitution are not entitled to the same deference as its interpretations of California’s pension laws.”