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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

COUNTY OF FRESNO,

Plaintiff and Respondent,

v.

BOARD OF RETIREMENT OF THE COUNTY OF FRESNO et al.,

Defendants and Respondents;

FRESNO COUNTY DEPUTY SHERIFF'S ASSOCIATION,

Intervener and Appellant.

F049691

(Super. Ct. No. 03 CE CG 01569)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. John J. Golden, Judge. (Retired judge of the Lake Super. Ct. assigned by the Chief Justice pursuant to Cal. Const., art. VI, sec. 6.)

Silver, Hadden & Silver; Silver, Haden, Silver, Wexler & Levine, Stephen H. Silver and Ken Yuwiler for Intervener and Appellant.

Baker, Manock & Jensen, Donald R. Fischbach and Olga A. Balderama for Plaintiff and Respondent.

Reed Smith, Harvey L. Leiderman and Jeffrey R. Rieger for Defendants and Respondents.

Kathleen Bales-Lange, County Counsel (Tulare) and Ron Rezac, Deputy County Counsel, for County of Tulare, County of San Diego, County of Santa Barbara, County of Kern, County of Mendocino, County of Merced, County of Stanislaus, and County of Ventura as Amici Curiae on behalf of Plaintiff and Respondent and Defendants and Respondents.

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This is an appeal from a judgment declaring invalid the method used to calculate the final compensation of Fresno County employees for purposes of awarding pensions. We affirm the judgment.

Facts and Procedural History

Defendant and respondent Fresno County Employees' Retirement Association (Association) is a retirement association organized pursuant to the County Employee Retirement Law of 1937 (CERL), now codified at Government Code section 31450 et seq. Defendant and respondent Board of Retirement (Board) is Association's governing board, responsible for "management of the retirement system." (Gov. Code, § 31520 [all further section references are to this code, except as specified].) Plaintiff and respondent County of Fresno (County) is responsible for the administrative costs of the retirement system (§ 31580) and for pension contributions on behalf of active employees (§ 31582). Intervener and appellant Fresno County Deputy Sheriffs' Association (appellant) is an employee organization representing certain active and retired Fresno County employees.

The pension for a county retiree under CERL is a percentage of the employee's final compensation. Final compensation, therefore, is an important concept, and the statutory definition of the term has, over decades, been amended in a manner favorable to

county employees. Originally requiring that final compensation be the average annual compensation earnable (§ 31461) by an employee "during the three years immediately preceding his retirement" (see Stats. 1947, ch. 424, § 1, p. 1265), the averaging requirement was amended in 1951 to permit the employee to select "any three years" of employment to average as his or her final compensation. (See § 31462, as amended by Stats. 1951, ch. 572, § 1, p. 1736.)[1] Then, in 1970, an optional provision was added as section 31462.1, permitting counties to adopt as the definition of final compensation the "average annual compensation earnable by a member during any year elected by a member at or before the time he files an application for retirement …." (§ 31462.1, added by Stats. 1970, ch. 316, § 1, p. 712.)[2]

County adopted the optional provision in 1975. When Roberto Pena was hired as administrator of Association in 2002, he learned that Association interpreted "any year elected by a member" to mean any 26 biweekly pay periods, whether or not consecutive to one another. Association had purchased computer software for calculating retirement benefits that automatically selected the 26 pay periods in which the employee's defined compensation was the highest. For more than 200 current retirees, this method resulted in a level of final compensation for pension purposes that was higher than the employee's actual compensation over the course of any actual, contiguous year of employment by

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[1] Section 31462 currently states: "'Final compensation' means the average annual compensation earnable by a member during any three years elected by a member at or before the time he files an application for retirement, or, if he fails to elect, during the three years immediately preceding his retirement. If a member has less than three years of service, his final compensation shall be determined by dividing his total compensation by the number of months of service credited to him and multiplying by 12."

[2] Section 31462.1 currently states, in relevant part: "'Final compensation' means the average annual compensation earnable by a member during any year elected by a member at or before the time he files an application for retirement, or, if he fails to elect, during the year immediately preceding his retirement." The omitted portion of the section provides that the section is not operative in a county unless locally adopted.

County. Pena learned that Association's method of calculating final compensation was unique among the 20 county retirement systems in California and was known informally as the "Fresno method." Pena brought the matter to the attention of Board, which investigated and held public hearings on the matter. Board failed to take any definitive action, however, and began preparations for a declaratory judgment action to resolve the issue.

Before Board filed its action, County filed the present petition for writ of mandate, alleging that the Fresno method was unlawful under CERL and that Board and Association had refused to discontinue use of the Fresno method. Appellant filed a complaint in intervention, alleging that adoption of the Fresno method by Board was within its plenary authority under California Constitution article XVI, section 17; that change from the Fresno method would unconstitutionally impair Association's contractual obligations to current and retired employees; and that County's right to challenge the Fresno method was waived in a settlement agreement in prior litigation. Board and Association filed a "preliminary response" to the petition for writ of mandate taking no position on the merits but asserting a willingness to "exercise [their] administrative authority" to implement any court directive on a prospective basis. Subsequently, Board and Association filed an answer generally defending the Fresno method and asserting affirmative defenses to County's petition.

The trial court ordered separate trials of issues raised in the petition (phase 1) and as affirmative defenses and in the complaint in intervention (phase 2). (See Code Civ. Proc., § 1048, subd. (b).) In essence, phase 1 was an adjudication of the meaning of the term "year" in section 31462.1: Does that section require determination of final compensation based on consecutive pay periods or does the permissible "year" include any 26 biweekly pay periods? Phase 2 was a determination of the effect of Association's current practice, the effect of the settlement agreement in a prior action, and the scope of Board's discretion to adopt a final compensation rule more generous than that prescribed

by section 31462.1 (to the extent that section specified the "year" as a continuous period of time).

After trial of phase 1, the court issued its tentative decision construing section 31462.1. The court concluded that section 31462.1's definition of final compensation as "the average annual compensation earnable by a member during any year elected by a member" requires that any year elected by a member be a period of 365 consecutive days. After trial of phase 2, the court issued its tentative decision that Board did not have discretion to deviate from the definition of final compensation contained in section 31462.1, that compelling Board to use the section 31462.1 definition did not deprive Association members of protected property or contract rights, and that the settlement agreement was inapplicable to the issues involved in the present litigation. After additional proceedings not relevant to this appeal (including an order permitting appellant to file a second amended cross-complaint against Board and Association only) the court on October 25, 2005, entered a final declaratory judgment for County in accordance with the prior tentative decisions.

Appellant filed a timely notice of appeal.

Discussion

A. The Statutory Language

Appellant contends "any year elected by a member" in section 31462.1 must mean "any 365 days selected by a member." Appellant articulates three primary arguments in support of this claim; none of the arguments has merit.

First, appellant compares the language of CERL with provisions of the Public Employees Retirement Law, section 20000 et seq. Appellant says that where the Legislature meant for a year to be 365 consecutive days the Legislature knew how to say so. Thus, section 20037 provides that the final compensation period for pre-1991 employees is "three consecutive years of employment." Section 20035, subdivision (a), effective for those retiring after July 1, 1991, bases final compensation on "any … period

of 12 consecutive months during his or her membership in this system that the member designates." (See also § 20035.5 ["12 consecutive months" for certain school retirees].)

These examples are not instructive. Far from indicating a distinction between the operative periods, we consider "12 consecutive months" and a "year" simply to be synonymous descriptions of the relevant period. As to appellant's comparison between section 31462 ("any three years) and section 20037 ("any other period of three consecutive years"), the legislative history of the two sections is of interest: Section 31462 was passed as Assembly Bill No. 637 (1951 Reg. Sess.). While the bill was awaiting signature by the Governor, a disagreement arose between the Los Angeles County Employees Association, which had sponsored the bill, and the State Association of County Retirement System Administrators. The chair of the latter organization wrote a letter to the Governor's legislative secretary saying that he "would personally like the language much better if the definition read '… during any period of three consecutive years ….'" (H. L. Byram, State Assn. County Retirement System Administrators, letter to Beach Vasey, Legislative Secretary to Gov. Warren, May 11, 1951.)

The legislative secretary gave this information to the Governor with the following comments: "I am confident that the language suggested by Mr. Byram … clearly states the intention of the Employees Association in introducing this measure.… [¶] I am writing a letter to the Los Angeles County Employees Association suggesting that they adopt the language submitted by Mr. Byram and consider such a measure to be introduced at a subsequent session. This will make it clear that they intend by their bill what Mr. Byram suggests." (Beach Vasey, Legislative Sec., mem. to Gov. Warren, May 19, 1951.) The Governor signed the bill on May 22, 1951. (Assem. Final History, 1951 Reg. Sess., p. 370.)

By letter of May 25, 1951, the Los Angeles County Employees Association disagreed: "We did not intend to refer to three consecutive years, but rather the best three

years selected by a member of the retirement system." (Wallace Braden, L.A. County Employees' Assn., May 25, 1951.)

We consider this exchange instructive because, while it shows the Legislature may or may not have meant something different by "three years" and "three consecutive years," no one involved in the process suggested that "three years" meant 78 separate pay periods or any other unusual construction that would render a year something other than 12 consecutive months.[3]

Second, appellant contends that use of the words "average annual" in the phrase "average annual compensation earnable by a member during any year" in section 31462.1 must imply "that the one year period need not be consecutive but, instead, can be broken periods adding up to one year. Had the Legislature intended to mandate the lower court's interpretation, the word 'average' would have been unnecessary surplusage, as there would have been no disconnected periods that were capable of being averaged."

This argument does not make sense linguistically: under appellant's interpretation of section 31462.1 the 26 selected pay periods are not *averaged* to compute annual compensation; the pay periods are *added together* for that purpose. More important, it is apparent from a comparison of section 31462.1 with the earlier-enacted section 31462, that the drafters of section 31462.1 simply substituted "year" for "three years," without

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3 In 2001, when the Legislature authorized certain changes to the Los Angeles County retirement system, it used the same phrase employed in section 31462.1 in a new section 31462.3, subdivision (a). Both sections define final compensation as "the average annual compensation earnable by a member during any year elected by the member …." In the legislative history of the bill enacting section 31462.3 "any year" is treated as synonymous with "any single year" and "the highest single year of earnings." (Assem. Com. on Pub. Employees, Retirement and Soc. Security, Rep. on Assem. Bill 399 (2001-2002 Reg. Sess.) as amended May 15, 2001, par. 1; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 399 (2001-2002 Reg. Sess.) as amended Sept. 7, 2001, p. 2.)

any particular regard for the concept of "average annual compensation" in the context of a single year's pay.

Finally, appellant points to two cases in which appellate courts construed Labor Code section 4850, which provides that certain employees injured in the course of duty are entitled to leave of absence with full pay in lieu of disability benefits "for the period of the disability, but not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension …." *Eason v. City of Riverside* (1965) 233 Cal.App.2d 190 considered the case of a police officer, injured in the line of duty, who returned to work for several brief periods before he was declared permanently disabled. From the date of his injury through the determination of permanent disability, a period of about two years, the officer was off work for a total of 32-2/7 weeks. During those weeks he received full pay in lieu of disability benefits pursuant to Labor Code section 4850. During the intervals when he returned to work he received his full pay as salary. He contended his full pay in lieu of disability benefits should have extended for an additional 19-5/7 weeks, for a total of 52 weeks of in-lieu pay, before his permanent disability payments began. The employer contended in-lieu payments were available to the officer only during the first year after the disabling event, regardless of how much the officer was off work during that year. (*Eason v. City of Riverside*, *supra*, at p. 192.)

The Court of Appeal agreed with the officer, but only in part. "Public policy favors an injured employee's return to work, and he should be given every encouragement to do so. To hold that salary earned during attempts to return to work count[s] against his leave of absence is to penalize him for trying to return to work, and contrary to the spirit of the Labor Code." (*Eason v. City of Riverside, supra,* 233 Cal.App.2d at p. 193.) This determination was dictum, however: the court went on to hold that the officer's right to in-lieu payments terminated on the date he was placed on permanent disability and he was not entitled to the additional 19-5/7 weeks of in-lieu payments he sought. (*Ibid*.)

Eason was followed in *Austin v. City of Santa Monica* (1965) 234 Cal.App.2d 841, 844, in the course of rejecting an employee's contention that the one year of in-lieu payments began anew each time an employee returned to work, even though additional absences arose from the same earlier injury. The court stated: "Any other interpretation would operate unequally and unfairly as between an employe[e] whose disability was continuous for a year and one who suffered disability at intervals which added up to more than one year." (*Ibid*.)

Whatever may have been the case in *Eason* and *Austin*, the word "year" in section 31462.1 clearly means 12 consecutive months. The measurement period for final compensation in section 31462.1 is a direct descendant of "three years immediately preceding … retirement" in the original section 31462 and of "any three years elected by a member" in the current version of that section, as we have discussed above. There is no indication in the structure or history of section 31462.1 that the Legislature intended to change the meaning of a year when it simply authorized counties to reduce the final compensation measurement period from three years to one year. We conclude section 31462.1 uses the word "year" in its ordinary sense to mean a continuous period of 365 days.

B. The Authority of the Board of Retirement

Appellant contends that Board has the constitutional and statutory authority to adopt its own definition of "any year" even if Board's definition is not the most logical or preferred definition of the statutory term used by the Legislature in section 31462.1. We disagree.

Article XVI, section 17 of the California Constitution provides, in relevant part, that the board of retirement of a public retirement system "shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system …." That section further explains, in paragraph (a), that the board of retirement has "sole and exclusive responsibility to administer the system in a manner that will

assure prompt delivery of benefits and related services to the participants and their beneficiaries."

"The system" to be administered by a county board of retirement is a retirement system authorized by the Legislature in CERL and adopted by the county's board of supervisors or by majority vote of electors pursuant to section 31500. That is, the board of retirement's constitutional "plenary authority" is not to administer any system it sees fit to create, but only to administer a system as authorized by law.

As we have held in the previous section, CERL establishes that boards of retirement must establish final compensation of a retiring member based on "the average annual compensation earnable by a member during any three years elected by a member" (§ 31462) or, if authorized by the board of supervisors, "during any year elected by a member" (§ 31462.1). That legislative definition of final compensation leaves no room for inclusion of compensation earnable during an alternative period (or, in this case, an alternative set of 26 periods). (See *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 494.)

Even if CERL left some room for adoption of alternative definitions of "any year," which we believe it does not, section 31462.1 places any such power in the hands of the boards of supervisors, which are empowered to adopt the one-year period in the first instance. In this case, when the Board of Supervisors of the County of Fresno adopted its resolution to make section 31462.1 applicable to the county employees retirement plan, the resolution stated that it would permit determination of final compensation based on "any one year elected by a member." (Fresno County Resolution No. 75-1088a.) Thus, even if boards of supervisors had discretion to adopt a broadened interpretation of "any year," the Fresno County Board of Supervisors did not do so.

In summary, the retirement system which Board is empowered to administer is a system that determines "final compensation" based on the compensation earnable by an employee during any single and contiguous year of covered employment elected by the

employee, or the last year of compensation if no such election is made. (§ 31462.1.) Board has no power, plenary or otherwise, to establish or administer a different system.

C. Neither Waiver nor Vested Rights Theories Protect Current Calculation Method

In litigation filed in 1998, appellant, along with other employee organizations and certain individuals, sought a writ of mandate to force Board to adjust the "compensation earnable" component of "final compensation" so as to include certain payments made to or on behalf of employees. (See First Amended Petition for Writ of Mandate, filed Aug. 21, 1998 (case No. 605588-3, Fresno Co. Super. Ct.).) That and certain related litigation were settled in 2000 pursuant to a court-approved settlement agreement. Among its other provisions, the settlement agreement required County to adopt a system of supplemental retirement benefits that would "approximate a formula of 'two and one half percent at age 55' for general members when consolidated with the [then-existing] service retirement formula …." The paragraph containing that provision also stated: "In no event shall the supplemental benefit … result in a retiree's allowance exceeding one hundred percent of that retiree's 'final compensation' as an employee as provided by the County Employees Retirement Law of 1937."

The settlement agreement contained a broad mutual release of all claims that could have been asserted in that litigation or that "in any way relate" to the litigation, including "the inclusion or exclusion of items in or from pensionable compensation under the provisions of the 1937 Retirement Act, and a retirement board's transfer of undistributed earnings in a retirement system." However, "this mutual release and discharge does not preclude any action to enforce the terms of this Settlement Agreement."

Appellant now contends the release provisions in the settlement agreement preclude County from asserting in the present action that Board's method of calculating final compensation results in a retiree's allowance exceeding the employee's final compensation as defined in CERL. This argument is meritless, however, since the settlement agreement expressly reserves to the parties the right to enforce the terms of the

agreement and one such term is the requirement that final compensation must be "as provided by the County Employees Retirement Law of 1937." As we have seen, section 13462.1 defines final compensation, for present purposes, as the average annual compensation earnable by a member in any single year of employment elected by the member. The present action, in essence, sought to enforce this limitation contained in, and not waived by, the settlement agreement.

Finally, appellant contends county employees and retirees have a vested contractual interest in the method of calculation of final compensation used by Board when they earned their pensions. Appellant acknowledges that one does not have constitutionally protected contract rights in a legally invalid contract, but it contends Board acted within its lawful discretion in adopting the "Fresno method" of calculating final compensation.

As we have held, *ante*, Board had no such discretion. The action of Association in applying a 26-highest-pay-period method for calculating final compensation "was the equivalent of attempting to form an unauthorized contract" (*Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 872) because that method conflicts with the requirements of section 13462.1. This is the case whether Board expressly approved the methodology or merely did so impliedly, since Board had no statutory power to approve the methodology.

Because the methodology adopted by Association was contrary to CERL, application of the correct statutory methodology does not violate the contract clauses of either the United States or the California Constitution. (See U.S. Const., art. I, § 10; Cal. Const., art. 1, § 9.) "The contract clause does not protect expectations that are based upon contracts that are invalid …." (*Medina v. Board of Retirement, supra,* 112 Cal.App.4th at p. 871, citing *Crane v. Hahlo* (1922) 258 U.S. 142, 146.) Employees and retirees have "a right to a pension to be calculated as mandated by CERL" (*In re*

Retirement Cases (2003) 110 Cal.App.4th 426, 453), and no right to one calculated under a local policy inconsistent with CERL. (*Id*. at p. 454.)

Disposition

The judgment is affirmed. Respondents are awarded costs on appeal.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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CORNELL, J.

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DAWSON, J.