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June 22, 2010

Little Hoover Commission
925 L Street
Sacramento, CA 95814

Re: Public Pension Systems - Advisory Group Meeting June 23, 2010

Dear Ladies and Gentlemen,

I want to thank the Commission for its thoughtful invitation to participate in a discussion concerning pertinent issues regarding public pensions. I submit these comments on behalf of the California Federation of Teachers, AFT, AFL-CIO (CFT) and the California Community Colleges Independents' Association (CCCI). As counsel for the California Federation of Teachers and many associations of retired school and college employees, I have a perspective to offer based on my handling of cases involving vested retirement health benefit rights, since 1985. While most of my experience has focused on retirement health benefits, much of what I've had direct experience with pertains to public pension rights as well.

I am enclosing with this letter some information which may be of interest to the Commission. This includes two articles I've written:

A Short Primer on Retirees Vested Health Benefits, *CPER*, Vol 163 (Dec. 2003)

Retiree Health Benefits: Still Misunderstood ... Still Protected, *CPER* Vo. 186 (Oct. 2007)

I am also including copies of a legal brief I wrote about the subject, and the recent final decision of the Fresno Superior Court in the case of *Fresno Unified Retirees Association (FURA) v. Fresno Unified School District*. (Fresno County Superior Court).

These documents outline many issues relevant to vested rights.

I have reviewed one of the two papers identified by Mr. Stern, "Public Pension Plan Reform: Legal Framework" by Professor Amy Monahan. I did not have time to read "Employee Benefits: Identifying Solutions in Difficult Economic Times" by Jeffrey C. Chang, Esq.

I have several critical comments about the paper by Professor Monahan (the "Paper" herein). Since I've had but a day to put this together, I'll apologize in advance for any errors or

omissions.

I. Vested Retirement Health Benefits

A. The Policy of Employer Paid Retiree Health Benefits Arose From Legislative Encouragement

Many of my comments are pertinent to both pensions and retiree health benefits, but I'm planning to put particular focus on health benefits.

In 1963 the State of California adopted legislation encouraging local public jurisdictions, from schools to special districts, to offer retirement health benefits to their employees. This legislation articulated the public policy of the State. The lack of such retiree coverage was at the time a serious concern, thus spurring considerable interest in this benefit from both employers and employees around the State. At the time, very few public employees were unionized, and none had the right to negotiate binding contracts. The Legislature's interest arose out of the widely shared concerns, such as that after retirement, many public employees would not enjoy the benefits of the new Medicare program (teachers, for instance, were exempt at the time). Public employers soon endorsed the idea employer-provided of retiree health benefits. At the time these benefits are relatively inexpensive, and they had the potential to help in recruiting and retaining employees. The benefit was often viewed as a *quid pro quo* for lower public sector wages.

Within the California public schools and community colleges, the benefit was welcome, and according to a survey of 800 of 1,000 school districts conducted by the California Department of Education in 2000, for retired employees under the age of 65, 62% of the Districts contribute 100% of the premium and 84% of the districts contribute some or all of the premium. For employees over age 65, 38% contribute all of the premium, and 53 % contribute some or all of the premium. These statistics indicate how important this benefit has proven to be.

B. Development of Judicial Protection

There are hundreds of retiree health benefits in the private sector. There are far fewer in the public sector, but these cases have been growing in number. I personally handled by first such case in 1985, and many since then.

In one case I handled, Contra Costa Community Colleges Retirees Association, decided favorably for the retirees in 1994, the College District argued that the right to retirement health benefits is not contractual prior to retirement. This argument harkened back to the early part of the 20th century when the law held that a pension did not vest and was a gratuity until the happening of the contingency upon which the pension depended. See, e.g., *Burke v. Police Relief*

and Pen. Fund (1906) 4 Cal.App. 235, 87 P. 421. However, this state of the law was long age discredited in a string of cases which have held that pensions are deferred compensation which vests upon acceptance of employment. See, e.g., *Kern v.* , 29 Cal.2d 848; *O'Dea v. Cook* (1917) 176 Cal. 659; *Aitken v. Roche* (1920) 48 Cal.App. 753.

In her article, Professor Monahan dismisses the legal theories which support nearly 100 years of legal history. I take issue with her analysis. I have identified specific areas of her Paper with which I disagree.

II. The Introduction - pp. 1-2 and the Gratuity Approach to Pensions

> The paper asserts that *"interest in reforming public pension plans" is "driven by the high costs associated with such plans and concerns about changing labor market where it is no longer the norm to remain employed by a single employer for a thirty year career."*

There are numerous reasons for "interest" in reform, of which the cost is one of them. However, to say that there is a "changing labor market" where it is "no longer the norm to remain employed" by a single employer is inaccurate when it comes to public employment. In the public schools, California community colleges, cities, counties and special districts, it is still common for many people to remain employed for a 30 year career. I haven't looked for California statistics, but I question this comment as being applicable in the California public sector.

A. The History of Pensions and Retiree Health Benefits

It has been recognized for nearly a hundred years that long-term public employment is induced by pension and health benefits. This inducement is often critical to the government, because the public sector is neither funded well enough, nor logistically agile enough, to match private sector salaries. Similarly, the public sector has used pensions and life-time retirement to induce the hiring of the best available candidates or jobs.

The Monahan paper offers a fair amount of historical perspective about the fact that public pensions were once viewed as gratuities and why this view changed. However, I disagree with several of the comments, and feel they give a misimpression of the historical record. This record is important to understanding why the courts have, for a hundred years, offered constitutional protection to vested retirement benefits. .

I agree with the paper that at one time pensions were viewed as gratuities. As Ms. Monahan writes,

> *"Historically, public pensions in this country were viewed as mere gratuities that could be withdrawn or amended by the state at any time.* (Monahan, p. 1)

The paper then offers reasons why this approach was rejected, and I disagree with those suggested:

1. Supposed "judicial dissatisfaction" with the gratuity approach because it was unfair.

> *Unsatisfied with a rule that allowed states to freely abrogate pension obligations, the vast majority of states have rejected the gratuity theory and instead protect public pensions under contract or property rights theories..."* (p. 1)

Although it is obvious that by the early 1900s, most courts had rejected the "gratuity approach," the reason was not simple "dissatisfaction." Rather, the cases document a logical and convincing reason - that these benefits were earned.

2. Supposed "Policy reasons" for the shift from gratuities.

> *"In some cases, the shift away from the gratuity approach was policy driven. Courts simply could not tolerate the absurd result of the gratuity approach, which allowed states to retroactively amend or terminate pension benefits at any time for any reason. In other states, the move .... was requiem by state constitutional provisions that prohibit ... gifts to individuals."* (pp. 3-4)

While retroactive rescission of promised benefits was, and remains, absurd, the "gift" rationale was not central to the court cases. Rather, it was a recognition that the benefit was earned, as part of a contractual agreement.

3. And, third, a judicial desire to "protect employees" from a State's outsized power.

> *"Discussion of reasonable expectations, then, may have arisen from a desire to protect an employee from the state's outsized power that results from long vesting periods, rather than an effort to determine what is actually reasonable for an employee to expect."* (Id. p. 33)

While I have not gone back and read all of the old cases, many of those I've read did not have long vesting periods. In the public sector in California, there is no law which restricts the negotiation of a vesting period - however, the cases hold that benefits, unless otherwise provided, vest when one is hired, or the benefit is improved. What matters then, in California, is the *accrual period* - the service required for the already vested right to be "earned."

The three reasons offered by the Paper are not actually born out in the historical record. But understanding the history is important to understand why the current "rules" developed. In fact, the "shift" from viewing pensions as "gratuities" and "charity" began with pensions for

service in the military (the Civil War) and from a judicial recognition that the pensions were in fact the trade-off for work - they were deferred compensation for services rendered.

A fairly thorough history of the historical antecedents of our current pension and public retiree health benefits is Serving the State Constitutionalism and Social Spending, 1860's - 1920's, by Susan Sterett, a political scientist..[1] Sterett's study recounts that from "1865 onward courts addressed the constitutionality of military pensions, civil service pensions ..." *Id*. at 316. Pensions arose in the context of societal stereotypes about gender and disability, and arose from concepts "that were divorced from any social reality." *Id*. at 314. Pensions evolved, and by the late 1800s pensions were justified on a contractual basis - as a way to "entice people into public service ..." *Id*.

Sterett says that "pensions were the subject of widely cited litigation ..." in several states. And then the U.S. Supreme Court decided *Pennie v. Reis*, 132 U.S. 464 (1889)[2] There a death benefit had been promised to the widow of a police officer, the monies coming from various sources including "fines imposed upon the members of the police force ... for violation of the rules and regulations of the police department."[3] The facts are simple: from 1878 until his death, pursuant to a city ordinance, Mr. Ward, a police officer of San Francisco since 1869, contributed $2 per month toward a life and health insurance fund, and upon the officer's death, his widow was to be paid $1,000. But shortly before he died, in 1889, the contributory law was *repealed*. Hence the City refused to pay his widow the $1,000 benefit when he died shortly after the law was repealed.

Mrs. Ward sued alleging she was deprived of a vested property right *without due process*. (In other words, she did not assert contractual impairment, and as becomes evident, the Court neglected this theory as well.) The California Supreme Court found for Ms. Ward, and the City appealed to the U.S. Supreme Court , which ruled for the City. It held that the City's promise

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[1] *Law and Social Inquiry*, Spring 1997 at p. 311 (22 LSINQ 311)

[2] Sometimes cited as *Pennie v. Res*

[3] I mention this to illustrate the landscape existing in the late 1800s and into the early 1900s, where workers could be fined by their employers for incompetence, speaking out, etc. The culmination of this principle came in the famous Danbury Hatters case *(Loewe v. Lawlor*, 108 U.S. 274 (1908)), where employees sued by their employer for going on strike lost their homes. This outmoded notion of employee servitude was finally declared illegal in *Complete Auto Transit*
v. Reis (1981) 451 U.S. 401, and other cases.

was "subject to *change or revocation at any time*, at the will of the legislature. There was no contract on the part of the state that its disposition should always continue as originally provided ..." *Id*. at 471.

The *Pennie v. Reis* decision cites *no precedent* for abrogating a clear promise. Even under an ordinary contract approach, the death benefit was contractual. However, the court saw the death benefit as resulting from the largesse of the sovereign state, and thus subject to change without notice. Pensions, to Supreme Court Justice Field, were gratuities, to be taken back for any reason, at any time. Rather, a pension beneficiary had no property interest in a fund until the happening of the contingency (i.e. the payment of the monies).

However, society soon recognized the contractual nature of pensions, partly because it was essential to encourage people to work for the government, and likely out of rejection of the *Pennie* decision. As Sterett astutely notes, this period saw women moving *en masse* into the teaching profession in the cities around the country, and a widespread recognition of education as serving a *public purpose*. "As civil service employment expanded into teaching, the constitutional arguments required to make the programs legally acceptable," that is, as *compensation for service*, ran counter to the historical view of pensions as charity for disabled veterans or widows and their children. It was this *service element* that held sway. Cities began establishing pensions for firefighters, police, then teachers, and eventually most categories of civil servants. Sterett explains that there was no more talk of "the pitiable and dependent condition of widows ...," now the analogy was to "service." *Id.* at 331-332.

Reis' narrow and monarchical approach was rejected soon by many states. This rejection had nothing to do with an "oppressive" and bullying government, but everything to do with government as a profession, with service as the commodity which was "traded" for the benefit, and because of a need to encourage teaching and other forms of government service as a profession..

B. *O'Dea v. Cook* Establishes Contractual Nature of Benefits in California

In California this transition became complete in 1917, when the California Supreme Court held in *O'Dea v. Cook* (1917) 176 Cal. 659, that pension benefits were vested rights. This decision rejected *Pennie*.

Once again, the facts were simple and straight-forward: Edward O'Dea joined the SFPD and received injuries in December, 1912 that directly resulted in his death in 1915. His widow was entitled to his pension upon his death. But after he had been injured, the Charter of the City had been changed to allow a widow's benefit only where one died within an officer year of his injuries. On this basis the City denied his widow Bessie, his pension. The Superior Court issued a writ of mandate requiring the trustees of the fund to honor the policy in effect when Edward

O'Dea had been injured.

The court held that:

> "[A pension] is not a gratuity or a gift .. where ... services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment." [relying on the New York cases which had rejected *Pennie v. Reis*] *Id*. at 661.

The court finally relied on the fact that the change in *O'Dea* resulted from a statute, and on the still settled principle that it was a "fundamental and universal rule in the construction of statutes that they shall be given prospective effect and not retrospective effect ..." *Id.* at 662.

From the decision in *O'Dea*, California courts have consistently recognized that retirement health benefits arise from a contractual relationship - the exchanger of labor for deferred, post-retirement compensation. The many cases decided in California in the last 100 years, fulfilling promises and preserving millions of dollars of earned compensation, are a testament to the recognition of this *quid pro quo* contractual relationship - earned employment in exchange for deferred compensation, the retirement benefit.

Ms. Monahan's paper neglects to afford proper credit to the contractual nature of this relationship. Indeed, her "solution" to pension and benefit "problems" would be to return us to the day when workers could be fined for doing their job and when civil servants worked for a sovereign that held nearly absolute control over their lives. That day has thankfully passed.

III. The Paper Affords Insufficient Weight to the Law Governing Changes in Vested Rights

The Paper is somewhat misleading when it notes that the government retains a "police power" to "make all laws necessary and proper to preserve the public security ..." [citing Blacks Law Dictionary]. (Paper, note 9, p. 8) The Paper adds that the state "*always* retains the power to amend the contract in accordance with the state's police power." Id., p. 7. It correct notes, then, in note 9 that the "[police] power is tempered by the requirements of the contract clause." [citation omitted] It is the later fact which deserves emphasis.

As one California court explained, "although the state may not contract away its police power, it may 'bind itself in the future exercise of the taxing and spending power .." *California Teachers Association v. Cory* (1984) 155 Cal. App. 3d 494, relying on United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) and *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal. 3d 296, 307-309.

As the many cases cited in my two articles and FURA brief explain, the State's power is tempered by the Contracts Clause of the Constitution. It is simply too late to revisit this proposition - it has widespread judicial support throughout the country.

IV. While Most Contracts Providing Retirement Benefits are Clear and Explicit, They May be Implied

The Paper asserts that most states do not have a specific constitutional provision discussing retirement benefits, but "imply the existence of a contract." Not so in California. Most of the cases in which vested benefits have been upheld involved explicit contractually-vested rights. These explicit promises appear in employer resolutions, ordinances and policies, and in bilateral collective bargaining agreements.

With a collective bargaining agreement (or a employer ordinance or policy), a court must often review documents and "interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." *Riverside Sheriff's Association v. County of Riverside* (2009) 173 Cal. App. 4th 1410, 1424. California courts may imply contractual obligations "from the particular words" at issue, and implied contracts are "of equal dignity with an express contract for purposes of the prohibition against impairment." *California Teachers Assn. v. Cory* (1984) 155 Cal. App. 3d 494, 505. An intent to grant contractual rights can be implied from *an unambiguous exchange of consideration between a private party and the state*. *Id.* The rules of interpretation are applied in light of this policy. In *Valdes v. Cory*, 139 Cal. App. 3d 773, 787 (1983) the Court focused initially on the specific provisions of a Retirement Law which demonstrated the State's vested commitment, then agreed that words in the statute "must be *read in context with the nature and purpose* of the statute as a whole. [citations]." *Id*. at 788, emphasis added.

A. The Contracts Clause

At the root of vested retirement health benefits is the Contracts Clause. The legal framework of this dispute is straightforward. The Contract Clause of the United States Constitution, Article I, Section 10, provides "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts ..." Article I, Section 9 of the California Constitution contains a parallel provision: "[a] ... law impairing the obligation of contracts may not be passed." This legal sanctity granted contracts is a *distinctive attribute of the U.S. Constitution*. James Madison saw the this clause as the "constitutional bulwark in favor of personal security and private rights," explaining that contract impairment was "contrary to the first principles of the social compact and to every principle of sound, legislation.[4] (*The Federalist* No. 44, at 282, C. Rositer ed. 1961.)

[4] The clause was designed to prevent endless legislative battles between factions aimed at redistributing property through "legislative interferences, in cases affecting personal rights . . . ."

Today the constitutional contract clauses are the only safeguards against public agencies solving their fiscal problems by shifting costs onto their retirees through the impairment of retirees' contracts. Since retirees have finished their service, they are left with no bargaining power - so this protection is essential. To treat contracts covering retirement benefits less protectively than agreements for property rental, or sales, would be unjustified. In fact, contracts covering retirement benefits are given special protection. Back in 1917 the California Supreme Court ruled, "It is a firmly established principle of judicial construction that pension statutes serving a beneficial purpose are to be liberally construed." *O'Dea, supra*., 176 Cal. at 662.

In California, many of the promises of retiree benefits appear in bilateral collective bargaining agreements. California holds that a collective agreement imposes a binding obligation on a school district.[5] A CBA assures employees that they may rely with confidence on promises of deferred compensation. The Promise protected retirees from unexpected premium charges, and worry about them, allowing them to enjoy the benefits of retirement. Some of these agreements recognize explicitly that employees accept lower pay in exchange for and reliance on promised deferred compensatoin. Retirement benefits are, in legal terms, "an indispensable part of the contract of employment ... , creating a right ... as an *integral part* of compensation payable under such contract." *Abbott v. City of San Diego* (1958) 165 Cal. App. 2d 511, 517.

B. The Paper Disregards the Distinction Between Contractual Impairments, and Substantial Impairments Under the Reasonable Modification Doctrine

Contracts "enable individuals [and public entities] to order ... their affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely upon them." *Allied Structural Steel v. Spannaus*, 438 U. S. 234, 245 (1977) The purpose of the Contract Clause is to protect the *reasonable expectations* of the parties. They promote stability in employment.

It is true that a retirement health benefits clause or a pension is at the heart of the employment relationship, and is frequently a *quid pro quo* for accepting lower salaries while one is employment. As an integral term of the contract, the impairment is almost always legally substantial.

This same principle, that impairment of an integral term of a contract amounts to a substantial impairment of the contract, governs almost all contractual agreements, whether for

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Id.

[5] Cal. Gov. Code § 3540.1(h); " ... a written document incorporating any agreements reached ... shall, when accepted by the ... public school *employer, become binding on both parties ..."; Glendale City Employees' Assn*., *supra*., 15 Cal. 3d at 335.

the purchase of crops by a grocery chain, or the selling of parts to Ford Motor Company.

There law treats pre-retirement changes in benefits for government employees differently than it does such changes in the private sector, however, in recognition of their status as government employees. This is the doctrine of reasonable and minimal impairments.

> "An employee's vested contractual ... rights may be modified *prior to retirement* in accord with changing conditions, for the purpose of keeping a pension system flexible to permit adjustments ... and ... maintain the integrity of the system." *Allen v. City of Long Beach* (1955) 45 Cal. 2d 128, 131, emphasis added; *Wallace v. City of Fresno* (1954) 42 Cal. 2d 180, 184. Changes must "bear some material relation to the theory of a pension system and its successful operation, and changes ... which result in disadvantages to employees must be accompanied by comparable new advantages." *Id.*

But post-retirement changes are restricted because the "reasonable modification doctrine" does not apply to post-retirement impairments. *Terry v. City of Berkeley* (1953) 41 Cal. 3d 698, 702-703. This is a crucial distinction which is not mentioned by the Paper.

The law already allows some flexibility in the future treatment of present benefits. It is clear that vested benefits can be changed prior to retirement "for the purpose of keeping a . . . system flexible to permit adjustments in accord with changing conditions and at the same time maintaining integrity of the system." *Allen v. City of Long Beach*, *supra*., 45 Cal.2d at 131. However, as noted by the Supreme Court:

> "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 26, 97 S.Ct. 1505, 1519.[6]

Thus, under the "reasonable modification doctrine," any modifications to the system "must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." *Allen,* 45 Cal.2d at 131. To be justified, it must be shown that

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[6] California law has placed pension rights and other deferred forms of compensation under the protection of the federal contract clause. *Legislature v. Eu*, (1991) 54 Cal. 3d 492, at 534. Although the language in the federal cases differs, the facts to be considered and analyzed appear to be the same in both state and federal cases. *Accord, Allen v. Bd. of Admin. of PERS* (1983) 34 Cal.3d 114, 120.

the changes were *necessary* to preserve the pension system as it existed prior to the changes, not as it applied to persons hired after the changes. *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 453, 455 (citing *Allen v. City of Long Beach*, 45 Cal.2d at 133). The government bears the burden of proof on this issue. Sonoma County, 23 Cal.3d at 310, 312; *Ass'n of Blue Collar Workers v. Wills* (1986) 187 Cal. App.3d 780, 791. This properly places a heavy burden on the government. The burden cannot ordinarily be filled by a prediction of future pension shortfalls.

In *United Fire Fighters of Los Angeles v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 259 Cal.Rptr. 65 (*rev. den. cert. den*. 1990) the court held that a cap on pension benefit cost-of-living adjustments was not justified by unforeseen pension cost increases or enactment of Proposition 13 which made the city unable to fund the pension through taxes. Evidence was presented that the savings from the cap were not used to meet an unfunded liability but merely spent on other items or added to the city's general reserve fund. Noting that the purpose of a cost-of-living adjustment is the preservation of a retiree's standard of living and that the cap lessened such economic security, the court struck the cap because the savings did not go to enhance the integrity or soundness of the pension fund. *Id*. at 1113.

An employer's assertion of changed circumstances "will not justify a substantial impairment unless it was unforeseen and unforeseeable." *United Fire Fighters*, 210 Cal. App.3d at 1111, citing *United States Trust Co.*, 431 U.S. at 31-32, 97 S.Ct. at 1522-1523. In *United States Trust Co.*, the Supreme Court held that the foreseeability of increased need for mass transportation in New York and the likelihood of substantial future deficits defeated the state's argument that repeal of a law affecting certain bond obligations was fiscally necessary. 431 U.S. at 31-32, 97 S.Ct. at 1522-1523. In *United Fire Fighters*, the city failed to consider the rate of inflation and the effect of annual salary increases on the pension system. The fund had unfunded liabilities from the outset. These and other errors in judgment and practice led the court to conclude that "a public entity cannot justify the impairment of its contractual obligations on the basis of the existence of a fiscal crisis created by its own voluntary conduct." 210 Cal. App.3d at 1113.

The reasonable modification doctrine offers protection for employees and retirees, and flexibility for the government.

V. The Contract Approach Does Offer Considerable Guidance in Identifying Which "Modifications" May be Legally Made

The Paper asserts that the "contract approach does not provide a great amount of clarity in identifying which pension modifications may legally be made." (Paper, p. 21) I disagree. The tests which have been adopted to identify and apply the contracts clause doctrine and the reasonable modification doctrine, are actually quite well known, and relatively easy to apply, as shown by the last section of this letter.

VI. The Paper Incorrectly Claims That Wages Are "Inherently" Different

The Paper asserts that the contractual rights theory, and others which have been judicially applied to protect vested rights, are "deeply problematic." It offers observations about "wages" versus "benefits" as a means of disregarding 100 years of sound, evolved and frankly essential precedent. It contends that "characterizing a public pension statute as a contract that begins at the time of employment often provides greater protection than it reasonable." (Paper p. 31) Yet it is when one is employed and begins to rely on a promise, or when the promise is made and thereafter relies, which establishes the fundamental basis for protecting benefits as vested rights. That is, employees rely on the benefit for future service, in exchange for deferred compensation in the form of pensions and retiree health benefits.

The Paper makes several errors in its discussion of pensions and post-retirement benefits as being different than how wages are treated. The Paper is wrong in two major ways. First of all, wages are not necessarily treated differently than pensions. In fact, wages can and sometimes do vest.

A. Salary and Other Compensation is Subject to Vesting

Apart from this rich history of enforcing pension statutes, California has recognized that benefits *including salary* may contractually vest:

Future *cost-of-living salary increases* for the 1978-79 fiscal year were held vested so that passage of a June 1978 initiative measure could not impair such contracts, even though the salary for that following year had not yet been completely earned. *Sonoma County Org. of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 304.

The Contract Clause protects other forms of deferred compensation like judicial salaries. *Legislature v. Eu* (1991) 54 Cal. 3d 492, 534; *Olson v. Cory*, 27 Cal.3d at 538 ["[T]he elements of compensation for [judicial] office become contractually vested upon acceptance of employment." *Id.* at 538-539 (n.3, citing *v. Bd. of Admin*. (1947) 21 Cal. 3d 859, 863)].

Disability benefits were held vested in *Frank v. Board of Administration of PERS* (1976) 56 Cal. App. 3d 236). There the Court of Appeal held that a disability pension vested at the time of employment despite the fact there was no service requirement for receiving disability benefits; the court rejected the argument that the benefits were not earned and did not vest until the employee was disabled. *Id.* at 242, 243.

Vacation pay was held vested in *Suastez v. Plastic Dress-Up Co*.(1982) 31 Cal. 3d 774, 781; and survivor benefits; *Dickey v. Retirement Board* (1976) 16 Cal. 3d 745, 749.

Scores of decisions recognize the right to enforce the statutes granting wages, through the writ of mandamus. The courts uniformly hold that mandate is the appropriate remedy to collect wages due teachers. *A.B.C. Federation of Teachers v. A.B.C. Unified School District* (1977) 75 Cal. App. 2d 332, 341-342[7] As *A.B.C.* makes clear, faculty should proceed in mandate to enforce statutes providing pay. Indeed, since 1857 California school teachers have enforced promised salary by judicial means. *Knox v. Woods* (1857) 8 Cal. 545 [writ of mandate issued to compel payment of salary owed to teacher].

Similarly, California has long recognized the employer policies are part of an employee's contract of employment, and judicially enforceable. *Goddard v. South Bay Union High School District* (1978) 79 Cal. App.3d 98, 105; *Frates v. Burnett* (1970) 9 Cal.App.3d 63, 69; *American Federation of Teachers v. Oakland Unified School District* (1967) 251 Cal. App. 2d 91, 97.

B. There Is a Distinction Between Wages and Benefits

The observation that it is "odd" for employees to *expect* to receive promised pensions disregards the reality of the workplace is itself rather odd. When an employer promises deferred compensation if one serves 10 or 20 years, and sets forth the parameters of what will be provided in retirement, there is nothing odd about expecting the benefit. Wages are, however, a different matter.

First, since the 1960s and 1970s, most wages are set either by collective bargaining or a formula which determines a comparable "prevailing wage." In the case of public service, employees ordinarily *expect annual wage increases*, such as COLAs (cost of living adjustments). In the collective bargaining context, most agreements are for 3 years have salary schedules and most public employees have a column and step on the employer's schedule, and defined rules for advancing. Although the negotiated changes to the schedule are sometimes known or uncertain, that one through services "advances" on the schedule is commonplace.

And while agreements for wages are subject to period renegotiation, even during the term of a contract. Such a system has existed since 1937, under the National Labor Relations Act.

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[7] Other mandate cases enforcing wage statutes include: *Caminetti v. Board of Trustees* (1934) 1 Cal. 2d 354, 356; *United Teachers of Ukiah v. Board of Education* (1988) 201 Cal. App. 3d 632, 640-644 [enforcing§45028]; *CSEA v. Azusa USD* (1984) 152 Cal. App. 3d 580 [enforcing §45203]; *Veguez v. Governing Board* (2005) 127 Cal.App. 4th 406 [enforcing§44977]; *CTA v. Governing Board* (1983) 145 Cal. App. 3d 735, 747 [mandamus appropriate to enforce § 44977, as case"depends on the interpretation of a statute or ordinance."]; *Napa Valley Educators v. Napa Unified School District* (1987) 194 Cal. App. 3d 243, 248 [enforcing §44977]

Wages in some ways like seniority system rights,[8] which the federal courts have held can be changed by collective bargaining, citing *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed 1048, and *International Longshoremen's and Warehousemen's Union v. Kuntz* (9th Cir. 1964) 334 F.2d 165. However, seniority rights in the private sector are collective rights. The Union's authority to negotiate over seniority is based in part on its authority to act for "mutual aid or protection." *Huffman*, 345 U.S. at 337. The court in *Phillips v. California State Personnel Bd. (1986) 184 Cal. App. 3d 651* followed this distinction between collective and individual rights when it held that unions may not waive minimum due process in termination procedures. 184 Cal.App.3d 651. In contrast, the *Kuntz* and *Ford Motor Co. v. Huffman* cases do not involve individual rights, but seniority, a collective right. Wages are the same - they are generally a "collective right," subject to negotiations" except where the contract is open for negotiations of wages.

Nevertheless, certain aspects of wages are subject to vesting, and the most important is vacation pay. A vacation with pay is in effect additional wages. Thus, terminated employees often enjoy a vested right to severance pay. See, e.g., *Owens v. Press Publishing Co.*, 120 A. 2d 442 ((1956) There, once service had been performed, the right to severance pay vested. That right was a product of their collective bargaining agreement.

In California, in *Suastez*, *supra*., the Supreme Court held that employees did expect to receive their vacation pay wages, and that the right to this pay vested as it was earned.

The essence of the above is that the Papers reliance on "wages" as undermining the right to deferred compensation in the form of pensions or retirement benefits is utterly misplaced. The laws distinct treatment of deferred compensation, earned and expected, differs somewhat among wages and benefits - in no case does it prove odd, however, that employees and retirees expect deferred earned pension and retirement health benefits to be provided as *promised*.

C. Employers and Unions Cannot Negotiate Away Vested Benefits for Retirees Because Unions do Not Represent Retirees

Wages can be changed, while one is employed, through negotiations and collective bargaining for unionized employees, and by policy for non-unionized employees. And, thanks to the reasonable modification doctrine, even vested retirement benefits can be changed in negotiations, provided legal limitations are observed. However, post-retirement changes cannot be modified, for unionized retirees, for unions cannot negotiate for retired individuals.

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[8] Reference to seniority as a "vested" right in the Kuntz case was the result of the plaintiffs' characterization, 334 F.2d at 167, a characterization not shared by the court. Id. at 171.

The federal courts have held that vested pension rights cannot be bargained away by unions. "Under established contract principles, vested retirement rights may not be altered without the pensioner's consent." *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.* (1971) 404 U.S. 157, 181, 92 S.Ct. 383 (n. 20)[9] Although *Allied Chemical* spoke to the relationship between unions and retired employees, the concept that unions cannot bargain away vested retirement rights has been applied to vested rights of employees still represented by the union. State courts have agreed. And so has the California Public Employment Relations Board. To the extent the Paper suggests otherwise it is simply wrong.

Here are some of the cases. In *Terpinas v. Seafarer's Int'l Union of N. America* (9th Cir. 1984) 722 F.2d 1445, it was held that once an employee became vested in a disability plan after 10 years of service, the union agreement to amend the disability plan could not operate retroactively to destroy or alter the employee's vested rights. 722 F.2d at 1447-1448.

In *Hauser v. Farwell, Ozmun, Kirk & Co.* (D. Minn. 1969) 299 F.Supp. 387, the court rejected the purported analogy to *Kuntz* and *Huffman* and held that "without explicit authority or a power of attorney from the individual members" the union could not bargain away the vested pension rights of employees, even though those employees had been at a meeting discussing the modification of the retirement plan and had received a copy of the modified agreement. 299 F.Supp. at 393.

In *Bokunewicz v. Purolator Products, Inc.* (3rd Cir. 1990) 907 F.2d 1396, it was held that disability pension benefits vested prior to application for the benefits and that a collective bargaining agreement which modified the plan between the date of injury and the date of application for the benefits could not waive the vested rights of the employees. Id. at 1401-1402. Thus, in the private sector vested retirement rights cannot be amended through collective bargaining without individual consent.

There are many more cases, the above is from an old brief.

The Paper's characterization of the contract theory as "problematic" is unwarranted. The sanctity of contracts motivated the Founding Fathers to include it in the Constitution. California included a similar clause. The law is now well-settled, for nearly 100 years, that pensions and retirement health benefits are subject to vesting. The rules are clear - often the facts of any particular situation are disputed.

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[9] *Allied Chemical v. Pittsburgh Plate Glass* held that retirees were not "employees" under the federal labor laws, and that unions may, but are not required to negotiate concerning benefits of retired employees. The footnote explained that even though unions could bargain for retirees, they could not bargain away vested rights without individual retiree consent.

VIII. Conclusion

The Paper indicates that it would be preferable to specify that any contract with an employee "is formed on an *ongoing basis* as services are performed," thus allowing that the "terms of the contract can be modified by either party." *Id*. at pp. 34-35 This is simply not possible. And it shouldn't be. Civil servants are not second-class citizens, they enjoy the same contractual protections we all do. There is not, and need not be an "exception" for tenured teachers. Firefighters, janitors, crossing guards, cooks, clerks, all employees deserve the same constitutional protection, not just professors or teachers.

The Paper rather callously offers that an employee "dissatisfied" by a change in his or her expected benefits, may "choose to terminate employment at any time if she desires a different salary and benefit package ..." These comments are inconsistent with reality. Hardly any governmental employee can "modify" the terms of her employment. Without a union, they have no bargaining power. And even with a union, a union cannot modify benefits for those who have retired with a vested right.

Although terms wages and benefits are negotiable for unionized employees, the reasonable modification doctrine restricts a negotiated change in benefits for employees who have already received vested rights. And of course, it notion that a governmental employee can just decide to quit when she dislikes a change in her retirement benefits, is unrealistic, for anyone who has worked years towards satisfying the conditions for deferred compensation is not going to quit.

The Paper acknowledges that once one has "served" in reliance on the state's offer, the state should not be free to retroactively change the terms under which service was performed. I find this comment difficult to rationalize with many that come before it. Of course, a public entity is usually free to make changes for new hires, but sometimes not those currently employed and not for those retired (insofar as vested rights are involved). But two tier systems have a way of causing severe morale issues, and turmoil, and are often not useful at all..

An understanding of the origins, features and protections of retiree health benefits and pensions in the public sector requires a knowledge of the *historical origins* of the constitutional protection of contracts, the judicial and societal recognition that public employees have contractually-protected benefits, and the extensive case law which has developed over a century.

The basis of *stare decisis* is the recognition that precedent matters. The Paper, for the most part, only gives lip service to precedent, and disregards the fine points of settled precedent..

Very truly yours,

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