

SUPREME COURT OF THE STATE OF CALIFORNIA

NO. S184059

RETIREED EMPLOYEES ASSOCIATION OF ORANGE COUNTY, SUPREME COURT

FILED

Petitioner,

vs.

NOV - 8 2010

COUNTY OF ORANGE,

Frederick K. Ohlrich Clerk

Respondent.

Deputy

After Order of This Court Accepting Certification of Question From
The United States Court of Appeals for the Ninth Circuit

**RESPONDENT'S REQUEST FOR JUDICIAL NOTICE;
SUPPORTING DECLARATION; [PROPOSED] ORDER**

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Attorneys for Defendant/Respondent

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Attorneys for Defendant/Respondent

Pursuant to California Evidence Code section 459 and California Rules of Court 8.520(g) and 8.252(a), defendant and respondent County of Orange ("County") hereby moves that this Court take judicial notice of the documents set forth below. This motion is divided into two categories. The first category consists of legislative actions of the Orange County Board of Supervisors including Board legislation setting health plan rates, personnel salary resolutions, and approved memoranda of understanding between the County and its employee bargaining units. These documents were all filed with the United District Court for the Central District of California as exhibits to declarations in the summary judgment proceedings in this litigation and are properly part of the record. Due to their volume, they were omitted from the excerpts of record filed with the Ninth Circuit and were thus not part of the record transmitted to this Court. The second category of documents is legislative history materials, which were not previously part of the record.

A. County Board of Supervisors Legislative Materials

The following requests constitute legislative enactments of the County Board of Supervisors, and are thus judicially noticeable under Evidence Code Section 452, subdivision (b). (See, e.g., *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 7, fn. 2, 40 Cal.Rptr. 3d 205 [taking judicial notice of city resolution].) Additionally, these documents are properly part of the record of these proceedings as they were exhibits to declarations filed

with the County's motion for summary judgment which generated the appeal resulting in the certified question to this Court. (Supporting Declaration of Arthur A. Hartinger ("Hartinger Decl."), ¶¶2-3, *infra* at p. 6.) The relevance of each set of requested documents is discussed in turn below.

Request 1: County Board of Supervisors annual legislation setting health plan rates for the plan years 1981 through 2009. (Submitted herewith as Exhibit 1, Vols. 1-4.) These documents were originally attached as Exhibit B to the Declaration of Patricia M. Gilbert, filed in the United States District Court on November 19, 2008. (See Excerpts of Record, Volume II, page ER 41; see also, Hartinger Decl., ¶2.) Moreover, these documents are all local legislative actions and thus judicially noticeable. (Evid. Code §452, subd. b.)

A principal argument of respondent Retired Employees Association of Orange County ("REAOC") in this matter is that by enacting annual rate legislation for the plan years 1985 through 2002 that set retiree rates equal to active rates for most of its group health plans, the County created an implied contract to continue to set health care rates in the same manner for existing retirees for the rest of their lives. Therefore, the rate setting legislation is relevant to demonstrate that the County's Board of Supervisors never enacted any legislation conferring such a vested right, by showing that each annual piece of Board legislation set the rates only for

the following plan year, and that there was no intent or action by the Board to limit its discretion to set rates in the future. (Respondent's Answering Brief on the Merits ("Ans. Br.") filed herewith, pp. 7, 16-17.) They cannot serve as the legislative instrument from which to imply a vested right to pooling. (*Id.*)

Request 2: The Declaration of Shelley Carlucci, filed with the District Court on November 19, 2008, as part of the summary judgment proceedings in this case, and Exhibits A through MM thereto. (Submitted herewith as Exhibit 2, Vols. 1-13.) Exhibits A through L to Ms. Carlucci's declaration are Personnel Salary Resolutions ("PSRs") adopted and approved by the County Board of Supervisors from 1988 through 2007. Exhibits AA-MM are memoranda of understanding ("MOUs") negotiated between the County Board of Supervisors and its employee bargaining units covering the time period from 1991 through 2010, coupled with Board of Supervisors legislation approving the MOUs. The PSRs and MOUs comprise the County's legislation regarding compensation and are relevant to show there is nothing in any of the Board's legislative files containing a commitment by the Board to set rates using a pooled method for the lifetime of a retiree. More generally, they are relevant to show there is nothing in any of the Board's legislative actions designating the pooling or equalizing of active and retiree rates as deferred compensation - or any compensation at all. (See Ans. Br., pp. 9, 16-17.) Like the rate legislation,

the MOUs and PSRs cannot serve as the legislative instruments from which to imply a vested right to pooled rates. (*Id.*)

B. Legislative History Materials

The county further asks that this Court take judicial notice of the following legislative history materials.

Request 3: The August 12, 1982 Legislative Analysts Report concerning Assembly Bill 3229. (Submitted herewith as Exhibit 3.) Reports of the Legislative Analyst are generally noticeable to determine legislative history. (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 279-280 fn 9, 46 Cal.Rptr.3d 638 [“The legislative history in this case is relatively brief and our citation to it is limited to various versions of the legislation and committee reports, all of which are indisputably proper subjects of judicial notice”], citing *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45, fn. 9, 77 Cal.Rptr.2d 709, 960 P.2d 513.) This report demonstrates the legislature treated the terms “resolution” and “ordinance” interchangeably by stating that a county could adopt an “ordinance or resolution...in accord with Section 31691,” thereby allowing the non-vesting provisions of Section 31692 to apply to a County enactment, whether by ordinance or resolution. (*See Ans. Br.*, p. 31.)

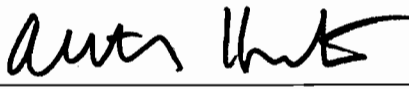
Request 4: Report of the Assembly Committee on Public Employees and Retirement concerning Assembly Bill 3229. (Submitted

herewith as Exhibit 4.) Again, legislative committee reports and analyses are the type of materials which are properly subject to judicial notice to determine legislative history. (*Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 465, fn. 7, 253 Cal.Rptr. 236.) This report is relevant to demonstrate the legislature's understanding that health care benefits provided to County retirees under Government Code Section 31691 are prohibited from becoming vested by virtue of Government Code 31692 except in the circumstance of Los Angeles County, where the legislature ratified an agreement between Los Angeles County and its employees to allow such benefits to become vested. (*See Ans. Br.*, at p. 31.)

Dated: November 8, 2010

Respectfully submitted,

MEYERS, NAVE, RIBACK, SILVER
& WILSON

By 

Arthur A. Hartinger
Attorneys for Defendant and
Respondent
COUNTY OF ORANGE

SUPPORTING DECLARATION OF ARTHUR A. HARTINGER

I, Arthur A. Hartinger, do hereby declare as follows:

1. I am an attorney at law duly licensed to appear before all courts of the State of California and am a principal with the law firm of Meyers, Nave, Riback, Silver & Wilson, attorneys for respondent County of Orange.

2. Submitted with this request as Exhibit 1 is a true and correct copy of all of the documents that were attached as Exhibit B to the Declaration of Patricia M. Gilbert, filed on November 18, 2008, in the United States District Court for the Central District of California, in support of County of Orange's Motion for Summary Judgment in this lawsuit. Ms. Gilbert's Declaration, without all of the Exhibits, is included in REAOC's Excerpts of Record at Volume II, pages ER 33-50. The documents attached hereto as Exhibit 1 are a true and correct copy of Orange County Board of Supervisors' legislation setting health plan rates for the plan years of 1981 through 2009.

3. Submitted with this request as Exhibit 2 is a true and correct copy of the Declaration of Shelley Carlucci, and Exhibits A through MM to that declaration as they were filed on November 18, 2008, with the district court in support of the County's motion for summary judgment in this litigation. Exhibits A through L to Ms. Carlucci's declaration are true and correct copies of the Orange County Board of Supervisors' Personnel

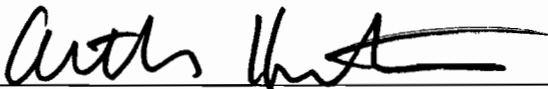
Salary Resolutions ("PSRs") approved and adopted by the Board of Supervisors from 1988 through 2007. Exhibits M through MM are true and correct copies of memoranda of understanding between the County of Orange and its employee bargaining units and accompanying resolutions of the Board of Supervisors approving those memoranda of understanding.

4. Submitted with this request as Exhibit 3 is a true and correct copy of California Legislative Analyst Report, dated August 12, 1982, reporting on Assembly Bill 3229.

5. Submitted with this request as Exhibit 4 is a true and correct copy of the report of the California Assembly Committee on Public Employees and Retirement concerning Assembly Bill 3229.

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

Executed this 8th day of November, 2010, in Oakland, California



Arthur A. Hartinger

[PROPOSED] ORDER

The request for judicial notice filed by Respondent County of Orange is hereby granted, and this court takes judicial notice of the following documents:

1. Rate legislation which was attached as Exhibit B to the Declaration of Patricia M. Gilbert filed in support of the County of Orange's motion for summary judgment (submitted as Exhibit 1 to the County's Request for Judicial Notice);
2. Personnel Salary Resolutions and Memoranda of Understanding approved by the County of Orange's Board of Supervisors which were attached to the Declaration of Shelly Carlucci and Exhibits A through MM thereto filed in support of the County of Orange's motion for summary judgment (submitted as Exhibit 2 to the County's Request for Judicial Notice);
3. August 12, 1982, Legislative Analyst report regarding Assembly Bill 3229 (submitted as Exhibit 3 to the County's Request for Judicial Notice); and,

4. Report of the Assembly Committee on Public Employees and Retirement Concerning Assembly Bill 3229 (submitted as Exhibit 4 to the County's Request for Judicial Notice.)

IT IS SO ORDERED

Ronald M. George, Chief Justice

PROOF 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, California 94607.

On November 9, 2010, I served true copies of the following document(s) described as on the interested parties in this action as follows:

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SUPPORTING DECLARATION; [PROPOSED] ORDER**

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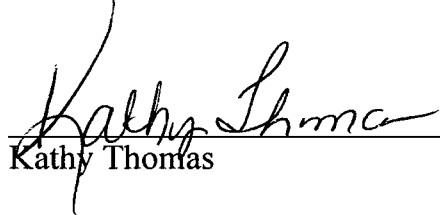
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BY PERSONAL SERVICE: I personally delivered the document(s) to the person being at the addresses listed in the Service List. For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package

clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office.

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

Executed on November 8, 2010, at Oakland, California.


Kathy Thomas

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