SUPREME COURT OF THE STATE OF CALIFORNIA

No. S184059

RETIRED EMPLOYEES ASSOCIATION OF ORANGE COUNTY,
Petitioner,

vs.

COUNTY OF ORANGE,
Respondent.

After Order Of This Court Accepting Certification Of Question From The United States Court of Appeals For The Ninth Circuit

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PETITIONER'S SECOND REQUEST FOR JUDICIAL NOTICE; [PROPOSED] ORDER

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Petitioner Retired Employees Association of Orange County ("REAOC") makes this Second Request for Judicial Notice pursuant to Rule of Court 8.252(a) and 8.520(g), and Evidence Code section 459, in support of its Response To Brief Filed By Amicus Curiae In Support Of Respondent County Of Orange.

Attached ad Exhibit A hereto is a true and correct copy of the Opening Brief filed on April 30, 1998 on behalf of the City of Fontana in the case entitled *San Bernardino Public Employees Association v. City of Fontana* (1998) 67 Cal.App.4th 1215. This document is available on Westlaw (1998 WL 34137194). It is relevant to this appeal because it will aid the Court in understanding the published opinion in the *City of Fontana* case, which Amicus rely upon in their brief. This document was not presented to the United States District Court in this matter and does not relate to proceedings occurring after the District Court entered judgment in this matter. This document may be noticed under Evidence Code section 452(g) because is it a record of the Court of Appeal for the Fourth District, and under section 452(h) because its authenticity may readily be confirmed by resort to Westlaw and/or the records of the Court of Appeal.

Attached ad Exhibit B hereto is a true and correct copy of the Amicus Brief filed on behalf of 55 California cities, in support of the City of

Fontana, in the case entitled *San Bernardino Public Employees Association v. City of Fontana* (1998) 67 Cal.App.4th 1215. This document is available on Westlaw (1998 WL 34113146). It is relevant to this appeal because it will aid the Court in understanding the published opinion in the *City of Fontana* case, which Amicus rely upon in their brief. This document was not presented to the United States District Court in this matter and does not relate to proceedings occurring after the District Court entered judgment in this matter. This document may be noticed under Evidence Code section 452(g) because is it a record of the Court of Appeal for the Fourth District, and under section 452(h) because its authenticity may readily be confirmed by resort to Westlaw and/or the records of the Court of Appeal.

Dated: February 4, 2011

Respectfully Submitted,

MOSCONE EMBLIDGE & SATER LLP

By: _____

[PROPOSED] ORDER

IT IS HEREBY ORDERED that Petitioner REAOC's Second Request for Judicial Notice is GRANTED.

Dated: _____

_____
Chief Justice
Supreme Court of California

I, JUSTINE CHMIELEWSKI, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed with Moscone Emblidge & Sater LLP, 220 Montgomery Street, Suite 2100, San Francisco, CA 94104.

On February 7th, 2011, I served:

PETITIONER'S SECOND REQUEST FOR JUDICIAL NOTICE; [PROPOSED] ORDER

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows and served the named document in the manner(s) indicated below:

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☒ **MAIL:** I caused true and correct cop(ies) of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) named above and, following ordinary business practices, placed said envelope(s) at the Law Offices of Moscone Emblidge & Sater LLP, 220 Montgomery, Ste. 2100, San Francisco, California, 94104, for collection and mailing with the United States Postal Service and there is delivery by United States Post Office at said address(es). In the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

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

Executed February 7th, 2011, at San Francisco, California.

JUSTINE CHMIELEWSKI

For Opinion See 79 Cal.Rptr.2d 634

Court of Appeal, Fourth District, Division 2, California.
SAN BERNARDINO PUBLIC EMPLOYEES ASSOC., Petitioner/Respondent,
v.
CITY OF FONTANA, A Muni. Corp. & Gregory Devereaux, City Manager Respondents/Appellants.
No. E021207.
April 30, 1998.

Appeal from the Superior Court of San Bernardino County The Honorable Bob. N. Krug, Judge San Bernardino County Superior Court Case No. SCV 36883

Appellants' Opening Brief

Best Best & Krieger LLP, Jack B. Clarke, Jr., Bar No. 120496, Bradley E. Neufeld, Bar No. 126911, Kevin T. Collins, Bar No. 185247, 400 Mission Square, 3750 University Avenue, Riverside, CA 92501, Telephone: (909) 686-1450, *Attorneys for Appellants, City of Fontana and, the Fontana City Manage*

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***1** 1. STATEMENT OF THE CASE

"... I cannot find and hold that Fontana is being treated equally in this situation and that this holding contains the basic concept of fairness under the law. It does not, in my opinion.
Because of all the reasons that I discussed with you this morning, or at least posed in the questions that I did, and discussion we had, somehow leaves Fontana out in the cold as far as the fairness of negotiated agreements are concerned, no matter what the circumstances." (The Honorable Bob N. Krug, Superior Court Judge announcing the ruling in the trial court below at Reporter's Transcript of Oral Proceedings ("R.T.") at p. 46, lines. 15-23.)

This case is the companion litigation to another appeal currently before this Court: Koval. et al., v. City of Fontana. et al., Case No. EO18762. As the court is aware, in Koval the trial court ruled contractual elements of compensation, which are considered to be subjectively important to employees and are asserted by them to be an inducement to remain employed, become non-bargainable fundamental vested rights of constitutional origin. (See Appellant's Opening Brief in Koval. et al., v. City of Fontana et al., Case No. EO 18762 at p. 21.) As in the Koval litigation this case also presents the issue of whether purely economic components of a collective bargaining agreement are fundamental rights.[FN1] Further, it ***2** presents the issue whether the trial court issued an improper advisory opinion on discussions which were to occur between respondent San Bernardino Public Employees Association ("SBPEA") and the City regarding retiree medical benefits.

> FN1. The economic components of compensation which the trial court found to be fundamental rights were longevity pay and personal leave accrual. Longevity pay is a compensation or bonus an employee receives for the service to the city. (Supplemental Clerk's Transcript ("C.T.") at p. 483.) Personal leave accrual is simply a term used to define sick leave and vacation leave accruals. (Id- at p. 482.)

During the course of the trial proceedings of the Koval litigation, Fontana explained that the trial court's reasoning would abrogate the collective bargaining system which was created by the Meyers-Milias-Brown Act. (M- at pp. 17-21.) The Act controls collective bargaining between employee bargaining units and public agencies, (Gov. Code, §§ 3500,3503.) The public agencies which are controlled by the Act are numerous and statewide. (Gov. Code, § 3501 ["... 'public agency' means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal

corporation whether incorporated or not and whether chartered or not."].)

This case shows, in bold relief, the illogical results of an application of the rationale of the Koval court, to the area of collective bargaining. Indeed, as will be fully explained below, the multitude of problems raised by the trial court in this case, in grudgingly granting the petition for writ of mandate, provides a firm basis for this Court to give full effect to the legislative mandate providing for collective bargaining in California and to reverse the trial court judgment. (See Gov. Code, §§ 3500-3505.1; International Assoc. of Fire Fighters' Union v. Pleasanton (1976) 56 Cal.App.3d 959, 967-968.)

***3** 2. THE BASIS FOR APPEALABILITY OF THE TRIAL COURT'S DECISION

This is an appeal from a superior court judgment granting a petition for writ of mandate. Thus, it is a subject for review by this Court. (Code Civ. Proc., § 904.1; see also California Civil Lit. Practice, (3rd ed.) CEB 1996 at pp. 331-332, §§ 9.84 and 9.85.)

3. STATEMENT OF FACTS

In 1990, the City and three collective bargaining units, the Yard Bargaining Unit, the Police Benefit Association and the City Hall Unit entered into labor contracts which are referred to as Memoranda of Understanding ("MOUs") for the period from July 1,1990 through June 30, 1993. C.T. at pp. 2-18.) The Units acted through and were represented by SBPEA. (Ibid.) The 1990 MOUs contained numerous articles covering wages and the terms of employment between the Units and the City. (Id- at pp. 124-151, 193-215, 261-288.) Some of those terms of employment included personal leave accrual, bilingual differential pay, health insurance, holidays, longevity pay and retirement health benefits. (Ibid.) All of those employment terms were agreed upon by all of the Units through the collective bargaining process. (Id. at pp. 2-18.)

In July of 1993, the City Hall 1990 MOU was extended, with several modifications for a one year period by a side letter agreement.[FN2] (Id. at pp. ***4** 147-151.) Some of the areas of modification of the MOU addressed overtime and compensatory time, holidays and even allowance for field personnel to wear walking shorts if not inappropriate. (Id.) to 1993, as during much of the 1990's, Fontana was faced with substantial financial problems. (M. at p. 148, ¶¶ 7, 8, 11.) The SBPEA was aware of that fact. Indeed, the City and the City Hall Unit agreed that "[w]ithin 90 days of [the agreement], the City [would] reform the budget task force [to] include representatives from the City Hall Unit." (Bad.) The financial constraints of the City had a tremendous effect on much of the Fontana City work force. For example, one of the City Hall collective bargaining unit negotiators was bumped out of her position of Accounting Technician in 1993. She explained mat "[d]ue to major layoffs, large numbers of employees lost their jobs. Several positions were eliminated ... in the finance department, and that individual's only option was to bump [her] out of [her] position because she had seniority .... [She] went down to Account Clerk 1 status." (Id. at p. 576.)

> FN2. For the purpose of brevity, this Statement of Facts primarily will address the City Hall bargaining unit MOU. Moreover, the Yard and PBA MOU's were subject to similar negotiations and are being treated substantially the same for the purpose of mis discussion.

The 1990 City Hall MOU was subsequently extended and amended again by yet another side letter agreement dated May 9, 1994. (Id- at pp. 152-156.) Again, the fiscal realities confronting the City and its employees was brought to the parties' attention. In that side letter agreement, the parties agreed that "[t]he City [would] exhaust all reasonable means available to avoid lay-offs and other furloughs of employees." (Ibid.) Lay-offs were a concern to the parties because over 100 employees had to be laid-off from their jobs with the City because of significant decreases in the City's funding sources. (Id. at pp. 451-452.)

***5** Further, "[t]he City agree[d] to consult with the SBPEA City Hall bargaining unit after providing two weeks notice

of any intent by the City to lay-off and/or furlough which [were to be] available to the City Hall bargaining unit." (Id. at pp. 152-154.) Thus, the parties to the MOU were always sensitive to the fact that the economic realties and limitations had to be dealt with as collective bargaining negotiations moved forward. It was in this light that the negotiations began for new MOUs in 1995; the MOUs which are the subject of this litigation.

In the spring of 1995, negotiating teams for the City Hall and Yard Units met with the City bargaining representatives.[FN3] (M- at pp. 455, 462.) According to more than one of the City Hall representatives, the negotiations took place for a period of almost three and a half months, and consumed over 100 hours of time. (Id. at pp. 477, 489, 573-581.) The City Hall and Yard Units were assisted in negotiations by a professional SBPEA labor representative, Mr. Jeffery Carr, and had the advice of the lawyers who are pursuing this case on behalf of the SBPEA. (Id at pp. 459, 462, 517-518.) The members of the Units were kept up to date on the negotiations on a regular basis at meetings when Mr. Carr and the Unit representatives would inform the Units about how the negotiations were progressing. (Id. at pp. 517, 520, 525, 547, 581-582.)

FN3. The Police Benefit Association negotiated its MOU in separate negotiations.

During several of these meetings for the Unit memberships, the subject of purported "vested rights" was raised by Mr. Carr and, indirectly, through the SBPEA lawyers. (Ibid.) According to one of the City Hall Unit negotiators, vested rights were explained to him at the meetings as "anything that was promised to you at employment and is more or less an ***6** enticement to work for the City that you are going to expect to be there at all times and not have removed from you your vested right to have those benefits." (Id. at pp. 568, see also pp. 602, 614.)

The issue of "vested rights" possibly being affected by the MOU's was brought up by the Unit representatives during the negotiations. (Id- at p. 428.) At that point, the City negotiators explained that they did not believe that non-bargainable vested rights were implicated in the negotiations and suggested the Unit representatives meet with their legal counsel to discuss the matter. (Had.) The Unit representatives did not raise the issue of vested rights again in the negotiations. (Ibid.)

As the negotiations continued, the City representatives explained the City was facing financial difficulties and that it was constrained in what it could offer. (Id. at pp. 500-504.) The SBPEA primary negotiator was skeptical of the City's budget analysis even though he never investigated to see if the City's analysis was accurate. (Id. at pp. 503-504, 573, 592-593.) The negotiations continued with the two sides submitting at least 50 to 100 counter-proposals back and forth to the other. (Id- at pp. 489, 573, 600.)

Finally, after three to four months of negotiations, the City representatives proposed another option which modified, but did not destroy, longevity pay and personal leave accrual. The City representatives explained that if this option was not acceptable, the representatives would recommend the City's previous offer to the City Council. That previous proposal by the City would have effectively reduced all salaries by seven percent. (M- at pp. 491-492.) If that proposal had been agreed to, it would ***7** have achieved the needed economic saving without affecting personal leave accrual or longevity pay. The only other alternative would be for the City to consider additional lay-offs or other cut-backs. (Id. at p. 453.) The City Council, however, never had to address the seven percent pay reduction option because both the City Hall and Yard Units voted to accept and ratify the modification to longevity pay and personal leave tune. (Id. at pp. 513-514.) Unfortunately, the Units' acceptances did not seal the deal.

Apparently, at the Collective Bargaining Unit meetings to consider the City's proposals, the SBPEA's primary negotiator explained to the membership that if the purported "vested rights" were affected in the negotiation process "the units could use legal action against the City." (Id. at p. 585.) It is important to note this was the time period prior to the Units' final meetings to consider the 1995 MOUs. (Ibid.)

There was never any disagreement between the parties that the negotiation could have resulted in a legal seven percent

pay decrease for all unit employees. (Id. at p. 492; see also Respondents Brief in Koval et al., v. City of Fontana Case No. BO 18762 at p. 4 ["The same cost saving could have been achieved by the City without affecting the vested benefits. In fact, had the City chosen to negotiate an across the board salary decrease for the entire bargaining unit there would be no triable issue."; emphasis added].) Yet, the collective bargaining units chose to enter into the agreements which lessened the future accrual of longevity pay and their personal leave time. (Id. at p. 486.) At the time the MOU's were agreed to, the collective bargaining units were very clear on five important points:

***8** First, the City did not act unilaterally in lessening away any elements of employee compensation. In that regard, the primary SBPEA labor representative explained the implementation of the MOUs in his deposition as follows:
"Q. NOW [MR. CARR] YOU HAVE SAID IN PRIOR TESTIMONY THAT THE CITY WAS TAKING BENEFITS AWAY. SIR, ISN'T IT TRUE THAT AT NO TIME DID THE CITY EVER UNILATERALLY TAKE AWAY ANY BENEFITS?
MS. GINSBERG [COUNSEL FOR SBPEA]: OBJECTION. ARGUMENTATIVE.
THE WITNESS: THE CITY DID NOT ULTIMATELY IMPLEMENT EITHER AGREEMENT. THEREFORE, IF - I GUESS YOU COULD INTERPRET THAT AS THAT THE CITY DIDN'T UNILATERALLY TAKE AWAY SOMETHING. THE PROPOSAL WAS LEFT UP TO THE VOTE OF THE MEMBERSHIP, AND THE MEMBERSHIP VOTED." (Id. at p. 512; see also C.T. at pp. 573, 600.)

Second, the 1995 MOUs were prepared as new agreements because the old MOUs had expired. Again, the union representative testified as follows:
"Q. AND SO THE 1995 MEMORANDUM OF UNDERSTANDING WAS A NEW MEMORANDUM OF UNDERSTANDING BECAUSE THE 1990 MEMORANDUM OF UNDERSTANDING HAD EXPIRED, CORRECT?
***9** A. YES." (Id- at p. 531; see also C.T. at pp. 573, 596-597.)

Third, the new 1995 MOUs only affected future accrual of personal leave and longevity pay. The 1995 MOUs were not retroactive. In other words any already earned personal leave time or longevity pay was not disturbed. (Id-at pp. 533-535.) Moreover, the SBPEA was very clear that the personal leave and longevity pay are economic elements of employee compensation. (Id- at pp. 482-484.) In fact in its petition, the SBPEA admitted "the longevity bonus was considered wages earned for the purpose of computing retirement." (See e.g., Id. at p. 22, lines 10-11; emphasis added.)

Fourth, the collective bargaining units acted as a result of "arms length" negotiations. Again, during his deposition, the SBPEA's primary labor negotiator testified:
"Q. YOU MADE MENTION THAT THE MOU OR THE CONTRACT, AS YOU USE THE TERM, IS A NEGOTIATED DOCUMENT, CORRECT?
A. CORRECT.
Q. AND WHEN YOU SAY "NEGOTIATED/THAT IS AN ARM'S LENGTH NEGOTIATION BETWEEN THE CITY REPRESENTATIVES AND THE REPRESENTATIVES OF THE ASSOCIATION, CORRECT? ***10** [OBJECTION BY COUNSEL FOR THE SBPEA]
THE WITNESS: YES, IT APPEARS SO." (Id, at pp. 467, 470-471.)

Fifth, the SBPEA agreed to meet and confer with the City representatives on the issue of retiree benefits. There was never any agreement to remove those benefits. (Id. at pp. 2-18.)

Despite those facts and the extensive back and forth negotiations which took place, the SBPEA filed the petition for writ of mandate below claiming that the City took vested rights from some of the SBPEA's members. As explained in the following text, that assertion was and is meritless.

4. PROCEDURAL HISTORY

In March of 1997, the SBPEA filed a verified petition for writ of mandate against the City of Fontana and the City of Fontana City Manager. (M- at p. 1.) In that verified petition, the SBPEA admitted it was a labor organization that represented certain employees of the City of Fontana for purposes of bargaining pursuant to the Meyers-Milias-Brown Act, Government Code sections 3500, et seq. (M- at pp. 1-2.) The SBPEA also admitted that it represented three separate bargaining units in the City, the City Hall Bargaining Unit, the Police Benefits Association Bargaining Unit, and the Yard Bargaining Unit. (Ibid.)

The gravamen of the verified petition was that the MOUs were negotiated between the City' and the SBPEA, and that the MOUs violated ***11** the Contracts Clauses of the United States Constitution and the California Constitution. (Id. at p. 32, lines 23-28.) Interestingly, the SBPEA alleged in its petition that the 1995 MOUs which the SBPEA was attacking had been ratified by junior employees over the objections of the most senior employees, and that the junior employees do not have the right to waive individual rights of the senior employees. (Id. at pp. 32, lines 6-9.)

The SBPEA then alleged that the City and the City Manager performed an act which the law prohibited because the City had executed the 1995 MOUs, which had been ratified by the SBPEA.[FN4] The respondents below timely answered the petition. (Id. at p. 39.)

> FN4. It should be noted Appellant City Manager Greg Devereaux has left that position to serve as the City Manager of Ontario, California. Since the City Manager was named in his official capacity only, that change does not affect this appeal.

In the trial court, the SBPEA asserted a legal theory which was essentially identical to the 22 claimants in the Koval litigation. The petitioners below first asserted, in rather bald fashion, that the City could not affect retiree benefits because they are in the nature of pension benefits. (Id. at pp. 97-98.) However, the SBPEA did not, and indeed, could not show that any decision by the City or the SBPEA had resulted in any change in the existing levels of retiree medical benefits. Instead, the SBPEA asserted, "[t]herefore, it is clear that, to the extent the City is attempting to reduce or eliminate a part of the pension benefits in the form of retiree health benefits, it cannot do so, even through the collective bargaining process." (C.T. at p. 98, lines 6-8.) The SBPEA then cited the California League of City Employees Association v. Palos Verdes Library District (1978) 87 Cal.App.3d 135 case for the proposition that elements of ***12** employee compensation which are important to the public employee and an inducement to continued employment become non-bargainable constitutional rights. (Id- at p. 98.) The SBPEA asserted those non-bargainable vested rights never can be reduced without violating the Contract Clauses of the Federal and State Constitutions. (Id. at pp. 98-100.)

Fontana opposed the SBPEA's petition for writ of mandate by explaining the legislative pronouncements and case law which have upheld and affirmed the effect of the Meyers-Milias-Brown Act. (Gov. Code, § 3500; International Assoc. of Fire Fighters Union v. Pleasanton (1976) 56 Cal.App.3d 959.) Further, the City explained that this is not a situation where junior employees had acted to the detriment of senior employees. (Id. at pp. 442-444.) On the contrary, a substantial number of the senior employees of each collective bargaining unit had to have voted to adopt the MOUs at issue, or the MOUs could not have been approved because the senior employees outnumbered the junior employees. (Ibid.) The City explained in detail that the Palos Verdes Library District case did not apply because it was a case of unilateral action, not a negotiated agreement as is presented here. (Id. at pp. 431-448.)

The trial court heard the SBPEA's petition for writ of mandate on July 10, 1997. During the course of the hearing, the trial court addressed several pointed questions to the SBPEA's counsel. Among the questions presented by the trial court were the following:
"I guess my question to the petitioners is: What happens to the constitutional rights of the City of Fontana regarding their right to a contract which they have negotiated in good faith in which they need, which they feel is necessary in ***13** order to function as a City, as a result of that need certain provisions have been negotiated which they can live with? ¶ It seems to me, if I accept the employees' position this is sort of a one-sided street, in that any constitutional rights the City has against having a contract which they can believe is a contract with a period of time of that contract

doesn't exist. ¶And it seems to me that any constitutional rights the City may have with the same kind of contractual protection doesn't exist.
So I guess my question is: In essence, first of all, that rings to me as being very unfair; and secondly, that Fontana can say we don't have any constitutional rights for being protected against impairment of contract obligations, because we don't have a contract." (R.T. at pp. 10-12.)

Counsel for the SBPEA attempted to respond to the court's question, and then the court raised the following additional question:
"The court: Well that troubles me. Because if it is comparable, Fontana hasn't gained anything, and they're out of - Fontana has a limited amount of money, and you were saying you can take away this, but you have to give something equal in value. Well you've done that, and they haven't gained anything, haven't saved any money. ¶ Troubles me. It always has to be comparable. Well, you can fire me, folks, but you can't take away my vested rights. [Counsel for SBPEA] Ms. Ginsburg: although you can have comparable benefits, not necessarily as costly as the benefits that the individual - The Court: what makes them comparable then? Ms. Ginsberg: Similar in nature or similar inducement. It is valuable to the individual employees whose benefits are being taken ***14** away. California League said a benefit is fundamental if it is important to an individual; you have to evaluate their individual position in their life, status, to determine whether it is important to that individual. The Court: What is important to the employee except what he makes and what he gets economically, financially? ¶ Ms. Ginsberg:
And I believe, your Honor, that case law has held that even prospective of financial hardship on the part of the City is not sufficient to overcome an individual's personal vested right, property right to a particular benefit that this individual is receiving. ¶ The Court: We are back to same premise, then: Then fire me, but you can't take away my benefits?" (Id. at pp. 19-20.)

Despite its obvious misgivings, the court granted petitioner's petition for writ of mandate because it believed it was bound by the PalosVerdes Library District case. (Id. at pp. 42-43.) In doing so, however, the court included the following observations:
"Sometimes to carry out the duty of a trial judge and follow the law is troubling and, frankly, in this case I find it to be so. ¶ It seems to me by this holding and the holdings which the Courts of Appeal seem to have made on this question, have created a class of constitutional rights by these so-called vested contractual rights which exceeds in constitutional standing every other constitutional right that I am aware of.
But now we've said, in essence, under an economic situation to collective bargaining, cities such as Fontana, which is compelled to collectively bargain through the representative of a group of employees, I gather from the ***15** petitioner's petition, no matter how many of those employees approve of that collectively bargained agreement, if it deals with some of these so-called constitutional vested rights, you can't do that; they can't be waived, ¶ That is carrying the argument, I think, to its logical conclusion." (Id. at p. 45.)

The court then entered the judgment on the writ of mandate in July of 1997. (C.T. at p. 633.) The City and the City Manager filed a timely appeal. (Id. at p. 639.)

The SBPEA then sought its attorney fees. However, the Court denied that request. Appellants respectfully request that the Court take judicial notice of the pleadings and ruling of the trial court on that issue. (Evid. Code, §§ 451,452.)

5. THE STANDARD OF REVIEW

The case primarily concerns questions of law which address the origins and elements of compensation under the collective bargaining process and the effectiveness of the Meyers-Milias-Brown Act. (Gov. Code, §§ 3500-3510.) This Court, therefore, is empowered to conduct a de novo review of the case. (Evans v. Unemployment Appeals Board (1985) 39 Cal.3d 398, 407; see also Jefferson v. Compton Unified School District (1993) 14 Cal.App.4th 32, 37-38.) Moreover, this Court may consider issues of law raised on appeal but not entertained or addressed by the trial court. (Tyre v. Aetna Life Ins. Co. (1960) 54 Cal.2d 399; Redevelopment Agency of Berkeley v. Berkeley (19781 80 Cal.App.3d 158.)

*16 6. ARGUMENT

A. CALIFORNIA LAW REQUIRES THAT THE CITY AND COLLECTIVE BARGAINING UNITS BARGAIN OVER ALL TERMS AND CONDITIONS OF EMPLOYMENT

A city and an employee association are required to negotiate in good faith regarding "wages, hours, and other terms and conditions of employment ...." (Gov. Code, § 3505.) Further, the collective bargaining units' scope of representation includes "all matters relating to employment conditions in employer-employee relations, including, but not limited to wages, hours, and other terms of employment ...." (Gov. Code, § 3504; International Assoc. of Fire Fighters Union v. Pleasanton (1976) 56 Cal.App.3d 959, 968 "[The (Meyers-Milias-Brown Act) thus 'defines the scope of the employee's right to union representation in language that is broad and generous.'" (quoting Social Worker's Union, Local 535 v. Alameda County Welfare Dept. (1974) 11 Cal.3d 382); emphasis in original].) Thus, essentially all issues concerning terms and conditions of employment are subject to negotiation. The only limitation the courts have placed on collective bargaining is that the bargaining units may not bargain away statutory on constitutional rights of individual members. (See e.g., Phillips v. State Personnel Board (1986) 184 Cal.App.3d 651 disapproved on other grounds by Coleman v. Dept. of Personnel Administration (1991) 52 Cal.3d 1102.)

*17 B. THE MEYERS-MILIAS-BROWN ACT CREATES CONTRACTS WHICH BIND BOTH PARTIES

The contracts negotiated under the Meyers-Milias-Brown Act are binding on both the public agency and the employee group. (Glendale City Employees' Association. Inc. v. Citv of Glendale (1975) 115 Cal.3d 328, 332.) The importance of stability of collectively bargained contracts has long been recognized in this state. (Ibid.)

For example, in Glendale City Employees- Association. Inc. v. City of Glendale. our California Supreme Court held that a memorandum of understanding negotiated between a city employee association and the city was binding after it was approved by the city council. (Id. at pp. 334-336.)

In that case, the Glendale City Employees' Association had negotiated with the assistant city manager concerning the employees' salaries for the 1970-1971 fiscal year. The negotiations resulted in a memorandum of understanding which was presented to the City Council. The agreed upon memorandum dealt with several issues concerning the terms and conditions of employment including "a cost of living adjustment, sick leave, incentive pay, and a salary survey ...." (Id at p. 332.) The disputed issue concerned a salary survey required by the terms of the memorandum.

A dispute arose concerning the salary range for employees at the top step of each employee's salary range. That dispute resulted in the employee association filing a suit on behalf of a class of affected city employees. The trial court upheld the memorandum of understanding and concluded that the *18 city was required to compute the salaries according to the court's interpretation of the memorandum.

The City appealed contending feat the memorandum was not binding. Our Supreme Court rejected that argument. In reaching its conclusion, the Court went through a thorough historical analysis of the Meyers-Milias-Brown Act. First, the Court noted that the Meyers-Milias-Brown Act grew from the George Brown Act. (Id. at p. 335.) The Court observed that that Act "sought in general to promote 'the improvement of personnel management an employer-employee relationships ... through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed.'" (Ibid.)

Second, after further analyzing the Meyers-Milias-Brown Act, the Supreme Court concluded as follows:
"The legislature designed the Act, moreover, for the purpose of resolving labor disputes. (Gov. Code, § 3500.) But a statute which encouraged the negotiation of agreements, and permitted the parties to retract their concessions and repudiate their promises whenever they choose, would impede an effective bargaining. Any concession from a pre-

viously held position would be disastrous to that party if the mutual agreement thereby achieved could be repudiated by the opposing party. Successful bargaining rests upon the sanctity and legal viability of the given word." (Id. at p. 336.)

By then- Petition, the SBPEA is doing exactly what the Supreme Court ruled they cannot; the SBPEA has been allowed to "retract their concessions" and repudiate their promises."

***19** C. THE TRIAL COURT IMPROPERLY EXPANDED LANGUAGE IN THE PALPS VERDES LIBRARY DISTRICT CASE TO SITUATIONS WHERE THE PARTIES HAVE ENTERED INTO A NEGOTIATED AGREEMENT

In the Palos Verdes Library District case, a Court of Appeals found that a public agency had unconstitutionally impaired an existing employment arrangement by unilaterally changing the terms of the existing arrangement. (California League of City Employees Association v. Palos Verdes Library District, supra. 87 Cal.App.3d 135 at p. 178 [Library District unilaterally changed the terms of employment by changing the agency's rules and regulations].) No memorandum of understanding was at issue in that case. (Ibid.) In that circumstance, the trial court found that the District "did not have the power to unilaterally eliminate ... benefits to those employees who had been working towards them prior to August [of] 1975." (Id. at p. 137.)

In the court below, the court noted that many of the cases which were cited by respondents dealt with unilateral action of a government agency in altering the terms of a contract. (R. T. at p. 43, lines. 22-28.) Nonetheless, the trial court felt that it was restricted by the reasoning of the Palos Verdes Library District case and compelled to hold that personal leave accrual, longevity pay, and retiree health benefits were vested and therefore "of some constitutional proportion." (Id.at p. 34, line 2.) The trial court's misgiving on its holding were valid.

***20** (1) THIS CASE DOES NOT INVOLVE UNILATERAL ACTION

The only distinct rule that can be gleaned from the Palos Verdes District Library case is that if a public entity acts outside of the Meyers-Milias-Brown Act and unilaterally changes the terms of an existing contract, the unilateral change will need to be measured under the Contract Clauses of our State and Federal Constitutions. (California League of City Employees Association v. Palos Verde Library District, supra. 87 Cal.App.3d 135 at p. 139.) That consideration is not present under a collective bargaining agreement negotiated under the Meyers-Milias-Brown Act. (Gov. Code, § 3500, 3505.) A careful reading of the Palos Verdes Library District case shows its inapplicability to this case. In reaching its conclusion the court explained:
"We think the trial court was correct in the circumstances of this case in concluding that the benefits were important to the employees, had been an inducement to remain employed with the district, and were a form of compensation which had been earned by remaining in employment .... [I]t would be grossly unfair to. allow defendant to eliminate such benefits and reap the rewards of such long-time service without payment of an important element of compensation for such service." (Id. at p. 140, emphasis added.)

As shown in the highlighted portion of the court's analysis, there was one crucial element in the court's reasoning: The "circumstances" of that case. Those circumstances were composed of a unilateral action by the ***21** defendant to "eliminate" benefits. (Id. at p. 137 ("[t]he trial court ruled that defendant did not have the power unilaterally to eliminate [those] benefits ...,"]; emphasis added.)

That element is not present in the context of a negotiated deal. (See Glendale City Employees Assn. Inc. v. City of Glendale supra, 15 Cal.3d at p. 336 ["Any concession by a party from a previously held position would be disastrous to that party if the mutual agreement thereby achieved could be repudiated by the opposing party. Successful bargaining rests upon the sanctity and legal viability of the given word"].) The Palos Verdes Library District court's limitation of its analysis to circumstances concerning unilateral action to governmental agencies, along with other

language in the case, provides insight into the true reasoning of that court.

The Palos Verdes Library District court started its analysis with the rule of law that applies to unilateral governmental actions affecting contracts outside of the collective bargaining arena. The court noted that that type of action may be affected by the Contracts Clauses of our State and Federal Constitution. (California League of City Employees Association v. Palos Verdes Library District, supra. 87 Cal.App.3d at p. 139; U.S. Const., Art. I, § 10; Cal. Const. Art. I, § 9.) The Contract Clauses of our State and Federal Constitutions prohibit a state government agency from impairing substantial terms of a contract, usually by legislation, unless there is a significant and legitimate governmental interest which would be furthered and the adjustment of rights between the parties is appropriate. rRue-Ell Enterprises, Inc. v. City of Berkeley (1983) 147 Cal.App.3d 81, 87-88; see also ***22**Allied Structural Steel Co. v. Spannaus (1978) 438 U.S. 234.)[FN5] In the Palps Verdes Library District case the public agency changed its agreement with its employees by a change of its own personnel rules and regulations. (California Jeague of City Employees Association v. Palos Verdes Library District supra. 87 Cal.App.3d at p. 137.

> FN5. In the Koval appeal appellants suggested that an emergency or compelling interest was needed in order to justify an impairment of contract. That rule has been loosened by our State and United States Supreme Courts. (See Rue-Ell Enterprises. Inc. v. City of Berkeley, supra. 147 Cal.App.3d at pp. 86-87.) Now, the focus of the analysis is on whether there was a "substantial impairment" and whether the reasonable expectations of the parties to the contract, at the time it was executed, was impaired by a subsequent change in the law. (Ibid.)

Thus, in reviewing the action of the Library District, the court could have concluded that the action was proper if it did not affect a substantial impairment of the agreement between the agency and its employees. (Rue-Ell Enterprises. Inc. v. City of Berkeley, supra, 147 Cal.App.3d at p. 87.) It was at this point of the analysis that the Court became confusing. Instead of looking to the terms of the employer-employee relationship using contract terms, the court made the unusual decision to cite Bixbv v. Piemo (1971) 4 Cal.3d. 130 in an effort to determine if the terms at issue in that case were substantial. (California League of City Employees Association, v. Palos Verdes Library District, supra, 87 Cal.App.3d 139-140.) The Bixby case was not relevant to the analysis because it simply stands for the proposition that the courts, in reviewing an administrative decision, will look to the nature of the right involved to determine whether the standard of review will be under the substantial evidence rule or independent judgment. (Bixbv v. Pierno. supra. 4 Cal.3d 130, 144.)

***23** What the Palos Verdes Library District court really seemed to be trying to do was to find an analytical method simply to determine if the rights at issue were so minor the agency validly could have changed them unilaterally. The court's effort to determine if the elements of compensation at issue in that case were substantial extended to its assertion that some elements of compensation are accorded the similar protections as pensions. (Id. at p. 139.) Taken in context, all the court was explaining was that when an agency acts outside of a negotiated agreement to remove elements of employment benefits, the fact that employees were working toward those benefits is relevant in determining if they are substantial. (Id. at pp. 139-140.) The cases cited by the Palos Verdes Libeary District court certainly do not even mildly suggest an employee's compensation should be treated like pensions. (Ibid.: see e.g. Youngman v. Nevada Irrigation Dist. (1969) 70 Cal.2d 240, 248-251, [Court noted that a public agency can be bound by contract to implement salary increase but not by promissory estoppel].)[FN6]

> FN6. Earlier courts had already instructed the Palos Verdes court that unilateral actions by government agencies in the area of labor contracts had to be closely reviewed. (See International Assoc. of Fire Fighters Union v. Pleasanton (1976) 56 Cal.App.3d 959, 967 "'[T]he courts have not been reluctant to intervene when a public agency has taken unilateral action without bargaining at all. In such situations, courts have been quite zealous in concluding the unilateral action and in granting appropriate relief.' Grodin, Public Employees Bargaining in California: The Meyers-Milias Brown Act In The Courts (1972) 23 Hastings L.J. 719,'753-754."])

Thus, it appears from a very careful reading of the Palos Verdes Library District opinion that the court simply used confusing language in proceeding through a Contract Clause analysis. That is to say the court merely found the Library District had improperly unilaterally changed the terms of employer-employee relationship without showing a sufficient ***24** reason for doing so. That conclusion is supported by the Palos Verdes Library District court's cryptic statement at the end of the case where it noted that "[t]here was no evidence that the financial integrity of the district was at stake." (California League of City Employees Association v. Halos Verde Library District, supra. 87 Cal.App.3d 135 at p. 141.) Thus, the court was indeed looking for a sufficient interest to justify the agency's action. Taken in this light, the Palos Verdes Library District court's decision is only a restatement of existing constitutional law with a few confusing statements.[FN7] Again, since this case concerns negotiated collective bargaining agreements under Meyers-Milias Brown Act, the Palos Verdes Library DJstrict decision is not relevant here.

> FN7. The Palos Verdes case was a truly unique one because the Meyers-Milias Brown Act was not an issue; thus there was no contract to apply or interpret. (See California League of City Employees Association v. Palos Verde Library District supra. 87 Cal.App.3d at pp. 139-141.) Therefore, the court had to stretch to apply the Contract Clause logic to that situation. (Id. at p. 139.) In contrast, more recent cases show the courts analyze MOUs negotiated under the Act in accordance with standard principals of contract interpretation. (City of El Cajon v. El Cajon Police Officers Assn. (1996) 49 Cal.App.4th 64, 70-71.)

(2) THIS CASE DOES NOT INVOLVE FUNDAMENTAL RIGHTS

Moreover, the 1990 MOUs could not have created any fundamental constitutionally based vested rights to economic terms because they expired by their own terms after three years. (C.T. at p. 531, 573, 596-597.) Thus, it was intended by the parties to those contracts that the contracts remain flexible so all items of wages and terms of conditions of employments could be negotiated. Indeed, the labor representative who was the primary ***25** negotiator in the lengthy negotiations that resulted in the MOUs which the SBPEA attacked, testified concerning the MOUs as follows:
"The MOU is a negotiated document that the city management and the particular bargaining unit meet and confer on, and each parry has an equal opportunity to bring forth additional terms and conditions of employment or bring forth proposals to delete the same. It is an amoebic type of document that continues to change throughout the years." (C.T. at 465-466, emphasis added.)

The law bears out the SBPEA's labor negotiator's statement on that point. (Gov. Code, §§ 3504, 3505, 3505.1: International Assoc. of Fire Fighters Union v. Pleasanton (1976) 56 Cal.App.3d 959, 966-968.)

Second, it is undisputed that this was not a situation in which already earned benefits were being forfeited. The parties understood that only future accrual of longevity pay and personal holiday leave were being affected. (See C.T. at pp. 533-534.) Thus, this case was one in which the parties accomplished a mutual goal of maintaining the flexibility of negotiating the terms and conditions of employment. The trial court mistakenly issued a of judgment requiring the parties to continue the terms of the 1990 MOU concerning longevity pay and personal leave accrual even after the source of those rights, the 1990 MOU, had expired. None of the cases cited by respondents support that result. (Id. at pp. 97-101.)

Confronted with this fact in the trial court below, respondents attempted to assert that the creation and presence of the concept of "fundamental vested rights" was a clear line which the City crossed. (R.T. ***26** at pp. 35; lines 15-28, 36; lines 1-28; 37; lines 1-28; 38; lines 1-28; 39; lines 1-7.) However, when respondent attempted to explain that clear line, it was required to admit that under respondent's theory the presence of the "fundamental vested rights" was based upon the subjective importance of the right to at least one individual. (Ibid.) So much for a "clear" line. Indeed, that reasoning is circular and flawed.

If the courts allow an element of economic compensation to become a non-bargainable fundamental right based upon the importance to an individual, that principal of law will vitiate the Meyers-Milias-Brown Act. The Mey-

ers-Milias-Brown Act unambiguously states that the collective bargaining units are empowered to negotiate wages and all terms and conditions of employment. (Gov. Code, §§ 3504-3505; International Assoc. of Fire Fighters Union v. Pleasanton (1976) 56 Cal.App.3d 959, 968.) The rule that respondent would have the court graft onto that legislative imperative is that wages and terms and conditions of employment may not be bargained if they are subjectively important and an inducement to continued employment of at least one employee. As the trial court below noted, there would be no principled basis to limit that rule to longevity pay and personal leave accrual. (R.T. at p. 20, lines 3-8; see also C.T, at pp. 451, 453, lines 9-28, 454, lines 1-11.) Respondents all but admitted in arguing their case in the trial court below that those two elements of compensation are a form of wages which should be completely negotiable under the Meyers-Milias-Brown Act. (C.T. at pp. 20, lines 19-20; 622, lines 1-8; 623, lines 12-13; see also International Fire Fighters Union v. Pleasanton (1976) 56 Cal.App.3d 959, 968.)

***27** Specifically, respondent argued that "[e]mployees who were receiving large amounts of personal leave under prior MOUs which could be cashed out at the time of retirement, now receive a significant reduction in the hours of annual personal leave that they were allowed to accrue. Similarly, where an employee was once allowed to receive a percentage of his salary annually as longevity pay (which also was used in computing his retirement benefit), such amount is now reduced to a straight figure, paid only when a particular year of employment is reached. Ultimately, these reductions affect an employee's retirement." (C.T. at p. 622, lines 1-8.) Thus, under respondent's analysis, the members of collective bargaining units really have a vested right to a certain amount of compensation at the time they retire. If that logic is accepted, then the actual monetary wages which an employee receives on a yearly basis could never be reduced because to do so would affect the amount that the employee might receive at retirement. Therefore, the Meyers-Milias-Brown Act's unambiguous statement that wages are subject to negotiation would be written out of the law.

(3) BECAUSE ECONOMIC TERMS OF A COLLECTIVE BARGAINING AGREEMENT ARE NOT FUNDAMENTAL RIGHTS, THE CASES RELIED UPON BY RESPONDENT ARE IRRELEVANT

Having shown that the Palos Verdes Library District case does not stand for the proposition that compensation can become a fundamental right, appellant will now show that the remainder of the cases cited by respondent below do not apply in this context. Below, respondent cited ***28** Pasadena POA v. Citv of Pasadena (1983) 147 Cal.App3d 695, 701 for the proposition that a pension cannot be "destroyed once vested without impairing a contracted obligation of the ... public entity." (bid.) A review of that case shows it does not apply.

In that case, plaintiff employee associations challenged a city charter amendment which unilaterally changed a basic monthly retirement benefit which began at age 50 from two percent of a member's final compensation for every year of service to "provide for a cost of living allowance (COLA) in addition to the basic monthly benefit, calculated to adjust the basic monthly benefit by the annual percentage change in the consumer price index." (Id. at p. 699.) Thus, it was not a case involving collective bargaining at all. Moreover, pension benefits are not at issue in this case. The fact that the SBPEA and the City had agreed to consider negotiating medical benefits is simply not a change of any contractual rights. Further, longevity pay and personnel leave are not "pension" rights; they are elements of wages. (C.T. at pp. 622-623.)

Similarly, Betts v. Board of Administration (1978) 21 Cal. 3d 855 does not help respondent. In that case a former State Treasurer's pension benefits were changed by state statute after his voluntary termination and just prior to his retirement. The State Supreme Court ruled that the amended statute had unilaterally removed a benefit which was a vested contractual right and that no new comparable benefits were shown in the plan. Again, this is not a situation in which pension rights have been denied Petitioner. It is a collective bargaining situation concerning the terms of employment.

***29** Thorning v. Hollister School District (1992) 11 Cal.App.4th 1598 also is inapposite. In that case, retired school board members sought redress against a school district when it unilaterally voted to suspend the retired members' health and welfare benefits. There was no collective bargaining in that case; again there was a unilateral action by a

school board affecting retirees.

Finally, below respondent cited cases asserting that fundamental constitutional rights cannot be bargained away in the collective bargaining process. fSee Phillips v. State Personnel Board (1986) 184 Cal.App.3d 651, disapproved on other grounds in Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102, 1123 fh.8.) However, respondent cannot identify how longevity pay or personal leave or retiree medical benefits can be elevated to the level of constitutional rights. The reason respondent cannot do so, is they are not based on any constitutional or statutory basis; they are created purely by the agreement of the parties and therefore are subject to amendment by the parties.

Petitioner's citation to Phillips v. State Personnel Board (1986) 184 Cal.App.3d 651 does not help it. In that case, the court simply held that an employee at Fresno State University had to be given constitutional due process upon his termination and that the collective bargaining agreement could not supersede that due process right. (Id. at p. 660) Similarly Alexander v. Gardener-Denver Co. (1974) 415 U.S. 36 and Barrentino v. Arkansas-Best Freight System (1981) 450 U.S. 728 do not support respondent. The Alexander case merely held that an African-American employee could pursue a Title VII discrimination claim even if he also pursued a grievance through his collective bargaining agreement. The ***30** Barrentino case addressed the Fair Labor Standards Act and whether a claim under the Act could be barred by submitting a claim to collective bargaining grievance procedure. Neither case is remotely applicable here. The parties never agreed to impair a statutory or constitutional right.

As has been repeatedly emphasized in these proceedings, the issues in this case concern elements of economic compensation not real fundamental rights such as free speech rights, the right to be free from racial or gender based discrimination or the right to due process. (R.T. at pp. 31-33; see also Phillips v. State Personnel Board (1986) 184 Cal.App.3d 652; Alexander v. Gardena-Danver Co. (1974) 415 U.S. 36; Barrantmo v. Arkansas - Best Freight System (1981) 450 U.S. 728.) In the context of our fundamental constitutional rights - those rights we maintain as citizens wherever we might work - respondent's theory makes sense. In this context it creates anarchy.

Indeed, when a governmental agency agrees to a collective bargaining contract, consented to by the parties to the contract, there cannot be an unconstitutional impairment of the contract. (See generally Social Services Union v. Board of Supervisors (1990) 222 Cal.App.3d 279 [collective bargaining agreement withholding wages for health benefits held valid]; see also International Association of Fire Fighters v. City of San Lsandro (1986) 181 Cal.App.3d 179.)

***31** C. IMPLEMENTATION OF THE TRIAL COURT'S REASONING INTO A PRINCIPAL OF STATE LAW WOULD MAKE THE COLLECTIVE BARGAINING SYSTEM UNWORKABLE

As explained above, there is no basis in law to transmute economic terms of a collective bargaining agreement into constitutionally based fundamental rights. If this court did so it truly would gut the collective bargaining process and denigrate real fundamental rights. There are several reasons why that is the case.

In asserting the basis for its cause of action, the SBPEA claimed that the MOUs it agreed to were illegal because the City violated the Contracts Clauses of the State and Federal Constitutions because "each senior employee was deprived of those vested, contractual rights without his [or her] individual consent." (C.T. p. 32, lines 21-22.) That assertion suggests the City would be allowed to ignore the bargaining representatives and approach each of the senior employees to bargain an individual deal. One wonders, if these economic terms of the MOUs are fundamental rights, whether the individuals could even modify them by bargaining if they were not represented by separate legal counsel. That question need not be answered, however, because the law is established that the City must recognize and deal with the SBPEA as the bargaining agent for its members. (Relyea v. Ventura County Fire Protection District (992) 2 Cal.App.4th 875.) The SBPEA acknowledged that principal of law in the trial court below. (R.T. at pp. 21, lines 18-28,22, lines 1-7.) That, however, is not the only practical flaw in respondent's argument.

***32** A second flaw was that respondent also asserted to the trial court that the "1995 MOUs listed [in the verified petition] were ratified by junior employees over the objections of the most senior employees, and the junior employees did not have the right to waive the individual rights of the senior employees. (C.T. at p. 32, lines 6-9.) The assertion in respondents'Petition seems to suggest that a majority of the senior employees might have had the power to change the type of compensation they would receive. It has now been shown twice in the trial courts below that the courts are willing to invalidate portions of collectively bargained contracts if the economic benefits are subjectively important to even one employee association member. (See R.T. at pp. 45, lines 25-28; 46, lines 1 - 4.) In fact the trial court noted the theory of respondents logically could be carried to the conclusion that even one-hundred percent of the employees voting could not waive the economic benefits at issue here. (C.T. at pp. 38, lines 7-23; 45, lines 25-28, 46, lines 1-6.)

Further, if one steps back from the fray for a moment, a serious question is raised as to why the SBPEA would consider arguing that its more junior employees essentially have less standing in the negotiations for economic employment benefits. In fact, counsel for respondent noted in the court below that under respondent's theory, lay-offs would be a means by which cities could stay within their budgets. (R.T. at p, 21, lines 4-21.) He also explained those lay-offs usually would be by seniority. (Ibid: see also p. 23, lines 24-27.) Thus, the respondent has all but said its most junior members are expendable. The unavoidable result of respondents' arguments is that even if the senior members wanted to cut elements of their compensation to save some of their co-workers' jobs, they could not do so.

***33** Interestingly, respondents were even factually incorrect concerning the percentage of senior members who voted for the MOUs. Uncontradicted evidence established that a significant number, if not the majority of all the senior employees for each Unit, voted for the MOUs. (C.T. pp. 442-444, 451-452.)

Finally, in the trial court, respondent raised the following rhetorical question in response to a question from the court: "In your scenario there are individual senior employees that voted against that that did not want to have their benefits reduced that worked all those years now are faced with whoever the majority is, if they are in the 10 percent minority, are being voted against and against their wishes they are losing their personal benefits. ¶ Who is there to protect their interests?" (R.T. at p. 25, lines 8-14.)

The answer to that question has to be: the employee association; in this case the SBPEA. Courts in this state have recognized the power of an association to represent its members for approximately 30 years. (Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 536-537.) Further, the courts have established they will use the writ of mandate process to allow employee associations a means to challenge a public employer's breach of duty under the Act. (Id. at 541 citing VerrtonFire Fighters v. Cirv of Vernon (1980) 107 Cal.App.3d 802, 810; see also San Francisco Fire Fighters Local 798 v. Board of Supervisors (1992) 3 Cal.App.4th 1482; Social Services Union v. Board of Supervisors, supra. 222 Cal.App.3d 279; American Federation of State etc. Employees v. City of Santa Clara, supra. 160 CaI.App.3d 1006; ***34**Public Employees of Riverside County. Inc. v. County of Riverside (1977) 75 Cal.App.3d 882.) As noted above, in its zeal to obtain a perceived bargaining advantage, the SBPEA is pursuing a rule of law that will undermine its ability to negotiate to protect junior workers. But be that as it may, the record in this case shows the extensive negotiations which occurred: four months of meetings; over 100 hours of negotiations; 50 to 100 proposals and counterproposals back and forth. All that work resulted in three MOUs with which the City was bound to comply. (Glendale City Employee-Assn., Inc. v. City of Glendale. supra. 15 Cal.3d at p. *336.*)[FN8] In spite of the intensity of the negotiations, at least two SBPEA representatives left the table believing the City negotiated in good faith. (C.T. at pp. 561-571, lines 16-22, 574-588.)

> FN8. This case also gives insight into some of the tenor of the negotiations. The SBPEA's chief negotiator suspected the veracity of the City staff members who explained the City's financial situation even though he had nothing to contradict the information; the chief negotiator also baldly proclaimed:
> "The purpose that I'm there for is to improve the benefits and working conditions and the salaries of the employees. That's what they pay me to do, so some of those things you know, I'm not asking [the City]. I'm going to the table saying, 'I want more.' That's what I do best." (C.T. at p. 508.)

Incredibly, even before the SBPEA members voted on the MOUs, their chief negotiator explained that the SBPEA counsel believed the final MOUs were illegal because of these alleged "fundamental rights." (C.T. at pp. 425-430.) The Units voted to ratify the MOUs even in the face of that legal advice. (Ibid.) In light of these facts, the trial court's observations that Fontana is being placed in a "no-win situation" was an understatement. (C.T. at pp. 38, lines 7-28,39, lines 1-2.)

*35 D. THERE WAS NO REVIEWABLE ACTION TAKEN BY THE SBPEA AND THE CITY CONCERNING RETIREE MEDICAL BENEFITS: THE ISSUE WAS NOT RIPE FOR REVIEW

"The primary purpose of the public Judiciary is to afford a forum for the settlement of litigable matters, between disputing parties." fNeary v. Regents of the University of California (1992) 3 Cal.4th 273, 281.) Thus, our courts have made it clear that matters which are not ripe for review must not be decided. (Ibid.; see also Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal.3d 158, 170; State Board of Education v. Honig (1993) 13 Cal.App.4th 720, 742-743.)

The trial court ordered that the language of the 1995 MOUs concerning retiree medical benefits for the City Hall, Yard and Police Benefit Association bargaining units be changed to reflect the 1990 MOU language. (C.T. pp. 633-634.) The trial court did so even though the nature of the language in the 1995 MOUs did not change the employees' rights to the benefits. (C.T. pp. 7, 12, 18.)

The language simply stated that the SBPEA and the City would meet and confer "regarding the additional incremented cost of future retiree benefits ...." (Ibid.) The court in the Koval case even acknowledged that no action had been taken on that issue. (See Appellants' Opening Brief in Koval. et al., v. City of Fontana. Case No. BO 18762 at pp. 37-38.) Thus, the trial court committed error by issuing an improper advisory decision.

*36 7. CONCLUSION

A party to a MOU cannot be allowed to repudiate their promises and retract their concessions after lengthy negotiations which result in an agreement. (Glendale City Einploees. Association. Inc. v. City of Glendale, supra. 15 Cal.3d at p. 336.) Further, there is no basis to find that economic elements of a MOU are constitutionally based fundamental rights. In order to preserve the integrity of the collective bargaining process and to give effect to the Meyer-Milias-Brown Act, appellants respectfully request that this Court overturn the decision of the trial court.

SAN BERNARDINO PUBLIC EMPLOYEES ASSOC., Petitioner/Respondent, v. CITY OF FONTANA, A Muni. Corp. & Gregory Devereaux, City Manager Respondents/Appellants.
1998 WL 34137194 (Cal.App. 4 Dist.) (Appellate Brief)

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For Opinion See 79 Cal.Rptr.2d 634

Court of Appeal, Fourth District, Division 2, California.
SAN BERNARDINO PUBLIC EMPLOYEES ASSOCIATION, Petitioners/Respondents,
v.
CITY OF FONTANA, et al., Respondents/Appellants.
No. E021207.
May 29, 1998.

Appeal from the Superior Court of San Bernardino County The Honorable Bob N. Krug, Judge, San Bernardino County Superior Court Case No. SCV 36883

Amicus Curiae Brief in Support of Appellants By California Cities of **Alameda**; [redacted]; **Avalon**; [redacted]; [redacted]; El Cajon; Eureka; Fremont; Fresno; Glendale; Grand Terrace; Gustine; Hayward; **Huntington Beach**; King City; Laguna Beach; Lawndale; Livermore; Long Beach; Los Alamitos; Los Altos; Modesto; Montclair; Montebello; Monterey; Murrieta; Nevada City; Norco; Ontario; Orange; Palm Desert; Pismo Beach; Pleasant Hill; Redding; Redlands; Roseville; Sacramento; San Bruno; San Diego; San Luis Obispo; San Pablo; Santa Rosa; Shasta Lake; Stanton; Sunnyvale; Sutter Creek; Thousand Oaks; City of Torrance; Tracy; Vacaville; and Towns of Los Gatos and Tiburon 54

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***1 I.**

INTRODUCTION

This action is critically important to public entities throughout the State of California. The trial court's ruling against the City of Fontana fosters a tremendous uncertainty in the arena of public sector labor relations. The ruling is fundamentally wrong and must be reversed.

At least since 1968, public employees have held the right to form employee organizations "for the purpose of representation on all matters of employer-employee relations." (Cal. Gov. Code § 3502.) Pursuant to the Meyers-Milias-Brown Act (MMBA), public agency employers have adopted procedures to certify and recognize duly elected labor associations as the exclusive bargaining representative for certain units of employees. After a labor organization is certified as the exclusive bargaining representative, public employers must meet and confer with the certified representative in an effort to reach agreement on employee compensation packages. Agreements reached through collective bargaining are incorporated into memoranda of understanding (MOLls) which become binding on all parties. (*Glendale City Employees Association v. City of Glendale* (1975) 15 Cal. 3d 328, 332.)

Here, the City of Fontana observed its obligations under the MMBA. The union agreed to a MOU which contained various terms and conditions, including ***2** certain reductions to future compensation accrual rates. The package was submitted to the union's membership, which voted to ratify the agreement. The agreement was submitted to the Fontana City Council, which approved a resolution to adopt the MOU.

Astonishingly, the same union that *expressly agreed* to the terms of the MOU sued to overturn certain of its provisions. The union argued that its agreement to reduce certain compensation was invalid because the compensation was "vested." The trial court agreed, and issued a peremptory writ ordering the City to reinstate certain compensation provisions.

The trial court's ruling, if affirmed, would directly harm the meet and confer process under the MMBA. The MMBA mandates that cities negotiate with designated representatives concerning wages, hours and working conditions. Collective bargaining presumes that the exclusive labor representative has the authority to reach binding labor contracts. Under the trial court's decision, the inherent "give and take" in labor negotiations would now be trumped by a new rule: cities can *give,* but cannot negotiate to take back, anything that is "vested." The contours of "vested" compensation are entirely unclear, but the term would now presumably include any compensation tied to seniority. For example, if a city council agrees to give a 5% premium to employees with thirty years of seniority (a "longevity" premium), successor city councils would be bound for ***3** thirty years to continue providing the premium or an "equivalent" benefit. Moreover, any benefit negotiated away at the bargaining table, could later be restored if the union can successfully argue that the benefit at issue is "important" to employees, or an "inducement" to continued employment. The ambiguity of this "vested" rights standard is manifest.

Originating in the context of pension benefits, the vested rights doctrine has been expanded in recent years, but it has

never been applied to invalidate collective bargaining agreements that include negotiated economic "take backs" achieved during the bargaining process. To allow unions to make package economic agreements at the bargaining table, later subject to lawsuits challenging fringe benefit and other wage concessions, would place public entities at an enormous disadvantage during contract negotiations.

The trial court questioned this inequity, but felt bound by *California League of Public Employees Ass'n v. Palos Verdes Library District.* Although *Palos Verdes* appears unsound and incorrectly decided, the court need not reach this issue because *Palos Verdes* is plainly distinguishable. In *Palos Verdes*, the union did not sign a contract. Here, the union expressly agreed to a labor contract after exhaustive ann's length negotiations. If the union made unauthorized concessions at the table, then any remedy should be *against the union,* not the city.

*4 On the other hand, if the *Palos Verdes* decision is interpreted to mean that compensation tied to seniority (e.g., future compensation rates, including vacation, personal leave and longevity pay) is vested and cannot be negotiated away, *Palos Verdes* is clearly wrong and should be clarified or overruled.

Amici urge this court to reverse the trial court's decision in this case. Further, amici respectfully request that the court clarify what is properly negotiable at the bargaining table. Amici suggest a clear and workable standard: retirement benefits and compensation that have been actually earned are subject to the vested rights doctrine, but *future* compensation rates (such as vacation accrual, personal leave, longevity pay, and other compensation increases tied to seniority) are not vested unless and until the employee performs the work and earns the pay at issue.

II.

INTEREST OF AMICI CURIAE

Amici curiae are 56 individual cities and towns throughout the State of California: City of Alameda; City of Albany; City of Avalon; City of Bakersfield; City of Burbank; City of Chino; City of Chowchilla; City of Chula Vista; City of Coachella; City of El Cajon; City of Eureka; City of Fremont; City of Fresno; City of Glendale; City of Grand Terrace; City of Gustine; City of Hayward; City of Huntington Beach; King City; Laguna Beach; City of Lawndale; City of Livermore; City of Long Beach; City of Los Alamitos; City of Los Altos; Town of ***5** Los Gatos; City of Modesto; City of Montclair; City of Montebello; City of Monterey; City of Murrieta; City of Nevada City; City of Norco; City of Ontario; City of Orange; City of Palm Desert, City of Pismo Beach; City of Pleasant Hill; City of Redding; City of Redlands; City of Roseville; City of Sacramento; City of San Bruno; City of San Diego; City of San Luis Obispo; City of San Pablo; City of Santa Rosa; City of Shasta Lake; City of Stanton; City of Sunnyvale; Sutter Creek; City of Thousand Oaks; Town of Tiburon; City of Torrance; City of Tracy; City of Vacaville.

All amici are municipal governments subject to the requirements of the MMBA. All must bargain collectively with employee organizations. Labor contracts resulting from negotiations entail cumulative payroll and other costs that account for the majority of city expenditures - often exceeding 70% of general fund revenues.

Amici operate under a constitutional mandate requiring balanced budgets. (Cal. Const. Art. XVI § 18.) Cities must publicly establish funding priorities for delivering public services. Amici have a strong interest in accurately forecasting their costs to ensure fiscal integrity and continued viability of public services,

The trial court's ruling fosters a critical and extraordinarily unfair uncertainty in collective bargaining and its impact on amici's budget processes. ***6** The standard applied by the trial court - creating special status for employment benefits that are "important" to employees and an "inducement" to continued employment - is inherently ambiguous and unworkable at the bargaining table. Amici therefore seek a clear and unambiguous legal statement describing what, and what is not, properly negotiable with labor unions. A flexible bargaining standard is clearly consistent with the express aims and purposes of the MMBA.

III.

STATEMENT OF THE CASE

A. The Advent of the Vested Rights Doctrine

The evolution of the vested rights doctrine in California stems from pension disputes and can be traced back to the year 1917, when the California Supreme Court issued its decision in *O'Dea v. Cook* (1917) 176 Cal. 659. In that case, a police officer's widow challenged the denial of her application for pension benefits after her husband died from the effects of work-related injuries he had sustained more than two years earlier. At the time Officer O'Dea sustained his injuries, the city charter provided that the spouse of an officer who was killed in the course of his employment was entitled to benefits. Prior to Officer O'Dea's death, that provision was amended to limit pension benefits to instances where the officer died of his injuries within a year.

***7** The Supreme Court held that Mrs. O'Dea was entitled to pension benefits. The Court found that the provisions in effect when Officer O'Dea was injured on the job were "a part of the contemplated compensation for those services." Thus, the Court concluded that the pension was not "a gratuity or gift" Rather, the pension but was "in a sense a part of the contract of employment" and thus enforceable.

Several years later, in *Aitken v. Roche* (1920) 48 Cal. App. 753, a retired police officer sought increased pension benefits based on a charter amendment that increased the salary of police officers on active duty. Under the city charter, the amount of pension benefits due to a retired officer were determined by the officer's salary at the time of retirement. The city rejected the request for increased pension benefits on the ground that Officer O'Dea's pension benefits had become fixed at the time of retirement at the rate specified in the charter prior to the amendment. The court rejected this argument and affirmed that although pension rights vest upon employment, the "right which was vested is the right to have the pension, not of a particular number of dollars." (*Id.* at 755.)

Subsequently, California courts affirmed that public employees acquire a vested right to pension benefits under contract principles. (*Dryden v. Board of Pension Commissioners* (1936) 6 Cal.2d 575 ["It has been clearly held that the pension provisions of the city charter are an integral portion of the contemplated ***8** compensation set forth in the contract of employment between the city and a member of the police department, and are an indispensable part of that contract, and that the right to a pension becomes a vested one upon acceptance of employment by an applicant"]; *Packer v. Board of Retirement* (1950) 35 Cal.2d 212 ["pensions for public employees are based upon the theory that such a pension is an integral part of the employee's compensation under his contract of employment"].)

Courts have recognized that pension benefits, despite their status as "vested rights," are immutable. In 1947, the California Supreme Court established that a public employee's vested pension rights are subject to an implied right on the part of the governing body to make reasonable modifications in the pension system. (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 179 P.2d 799; *see also Wallace v. City of Fresno* (1954) 42 Cal.2d 180, 183, 265 P.2d 884 ["[T]he employee does not obtain, prior to retirement, any absolute right to fixed or specific benefits, but only to a 'substantial or reasonable pension.'"].)

Under this theory of vested rights, California courts have permitted public employers to make "reasonable" modifications to their employees' pensions if the following two conditions have been met: first, the modification must be materially related to the theory of a pension system and its successful operation; and second, any changes in the pension plan which disadvantage the employees should be ***9** offset by "comparable new advantages." (*Betts v. Board of Administration of the Public Employees' Retirement System* (1978) 21 Cal.3d 859.)

B. The Expansion of the Vested Rights Doctrine to Nonpension Cases

The protections afforded pensions benefits based on the "vested rights" theory has been extended to nonpension cases in just a few situations - none of which involve a negotiated MOU. In *Olson v. Cory* (1983) 35 Cal.3d 390, the California Supreme Court held that the future statutory cost of living adjustments could not be reduced for sitting judges. No collective bargaining agreement was at issue in Cory.

Later, two court of appeal decisions applied the doctrine to non-pension, economic benefits. In *California League of Public Employees Ass'n v. Palos Verdes Library District* (1978) 87 Cal.App.3d 135, the court considered whether three benefits tied to seniority could be unilaterally eliminated by the employer. The three benefits were a longevity salary increment, an extra week of vacation after ten years of continuous service, and a four month sabbatical at the end of each six years of service. The court found that the benefits in question were "fundamental rights" which had vested and could not be unilaterally modified. Unlike the present case, *Palos Verdes* did not involve a negotiated agreement. Further, for reasons discussed more fully below, the *Palos Verdes* court was ***10** wrong for characterizing fringe benefits as "fundamental" and for expanding the vested fights doctrine to non-pension, economic benefits.

In *Thorning v. Hollister School District* (1992) 11 Cal.App.4th 1598, the court, relying heavily on *Palos Verdes,* held that a school board could not unilaterally terminate the health benefits of retired school board members because those benefits were "fundamental." Again, *Thorning* did not involve a negotiated collective bargaining agreement.

C. Collective Bargaining in the Publie Seetor

At the time the "vested rights" doctrine was first recognized and developed, public employees possessed no collective bargaining rights. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 175-176 ["Prior to 1961, public employees in California enjoyed no formal rights to participate in the decision-making processes which determined the terms and conditions of their employment"].) Rather, employment was purely statutory, and public employees were subject to those terms and conditions of employment established by city resolutions and ordinances. (*See, e.g., Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426.)

In 1961, the George Brown Act was enacted. The Brown Act was the first law governing collective bargaining in California's public sector. The MMBA ***11** was enacted in 1968 and replaced the Brown Act with regard to California's local governments and their employees.

Similar to the National Labor Relations Act, the MMBA establishes a mandatory collective bargaining system for local governments and employees.[FN1] Its stated purpose is to "promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Gov. Code § 3500.) The statute requires public employers to meet and confer in good faith with the exclusive representative of a bargaining unit on all matters within the scope of representation. (Gov. Code § 3505.)

> FN1. Courts routinely look to the NLRA to interpret similar MMBA legal issues. (*City of El Cajon v. El Cajon Police Officers' Assn* (1996) 49 Cal.App.4th 64). The MMBA differs from the NLRA in several respects. First, it allows individuals *not* to exercise rights or participate in MMBA processes. (Cal. Gov. Code § 3502.) Second, contrary to the NLRA, supervisors are not precluded under the MMBA from organizing and bargaining collectively. (*Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331.) Finally, the MMBA does not have a corollary enforcement mechanism to the NLRA's National Labor Relations Board.

The scope of representation consists of "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment...." (Gov. Code § 3504.) In practice, of course, a host of issues are routinely negotiated during the meet and confer process, including:

***12** • wage and salary schedules
• overtime pay
• premium pay
• shift differentials
• seniority provisions
• layoffmlcs
• discipline roles
• longevity pay
• sick pay
• leave accrual and cash outs
• vacation
• insurance and arbitration
• grievance and arbitration
• hours
• organizational security

(*See California Public Sector Labor Relations* § 11.22, Mandatory Subjects of Bargaining (Matthew Bender 1997).

Contracts negotiated under MMBA between public entities and labor organization are binding. (*Glendale City Employees Association v. City of Glendale, supra,* 15 Cal.3d at 332.)

D. Facts in This Case

The City and SBPEA have shared a collective bargaining relationship for many years. In spring of 1995, negotiations began between the City and SBPEA representatives for new MOUs and continued for more than 100 hours over a period of almost 3 1/2 months. (CT, Vol. III, p. 427:12-15.) Eventually, the parties reached agreements.

***13** The agreements included the following changes: personal leave accrual rates were reduced; longevity payments were transformed from an annual payment based upon a percentage of an employee's salary to a fixed amount paid when the employee became eligible for the increase; and the parties agreed that retirement health benefits would be renegotiated.[FN2] (CT, Vol. III, p. 618:19-24.) These provisions of the MOUs were strictly prospective. Thus, there was no change in any employee's previously accrued or used balances of personal leave, longevity pay or health benefits. The employees in the bargaining units ratified and approved the terms of the MOUs by majority votes. (CT, Vol. I, p. 75:6-8.)

> FN2. The trial court's inclusion of the retiree health benefits provision in its order is facially erroneous. The contract called only for future negotiations. Later, the retiree health benefits provisions of the MOU's between the City Hall and Yard bargaining units were modified by side letter agreements dated July 16 and July 25, 1996, respectively. (CT., Vol. I, pp. 19:20-20:2.) The side letter agreements *raise the level* of retiree health benefits provided to City Hall and Yard unit members. (CT, Vol. I, p. 19:24-26.)

E. Procedural History

On or about March 17, 1997, the San Bemardino Public Employees Association ("SBPEA") filed a petition for writ of mandate in the San Bemardino Superior Court against the City of Fontana ("the City" or "Fontana") and its City Manager, Gregory Devereaux. In its petition, SBPEA asked the court to set aside certain provisions of three MOUs that the City and SBPEA had negotiated in 1995 on behalf of the three bargaining units. (Appellant's Supplemental Clerk's Transcript ("CT"), Vol. I, pp. 1-36.) SBPEA argued that the MOU provisions ***14** relating to accrued personal leave, longevity pay and retiree health benefits deprived senior City employees of "vested" contractual rights and thus violated the contract clauses of the federal and state constitutions. (*Id.*)

The trial court granted the writ. In his July 14, 1997 order, Judge Krug held: (1) personal leave, longevity pay and retiree health benefits are constitutionally protected "vested" rights; (2) these benefits cannot be negotiated to the detriment of the employee "even if such reduction was agreed to and included in a collective bargaining agreement reached as a result of the good-faith negotiations between the City and the employees' chosen labor representative; and (3) although "virtually no evidence [was] presented on this issue," it appeared that comparable consideration was not given in exchange for the reduction in benefits. Judge Krug ordered the City to set aside the provisions relating to personal leave accrual, longevity pay and retiree health benefits in the 1995 MOU, and "to restore retroactively those provisions of the 1990 MOU which were in effect prior to the effective date of the 1995 MOU." (CT, Vol. III, pp. 628-630.)

V.

ARGUMENT

A. THE COURT ERRED IN INVALIDATING PROVISIONS NEGOTIATED PURSUANT TO THE MMBA.

The common law "vested rights" doctrine preceded public sector collective bargaining by over half a century. The MMBA, and the authority of ***15** labor unions to bargain collectively on behalf of employees with public agencies concerning a broad range of economic and non-economic issues, has never been definitively squared with individual "vested" rights. This case presents the opportunity for the Court of Appeal to clarify the inherent tension between the MMBA obligation to bargain and the protection afforded individual "vested rights." Amici urge the Court to adopt a clear and workable standard, and consistent with the MMBA, one that allows for flexibility during contract negotiations.

California state courts recognize the "strong public policy favoring collective bargaining agreements in the public employment sector." (*Paramount Unified School District v. Teachers Association of Paramount, CTA/NEA* (1994) 26 Cal.App.4th 1371, 1385.) Once a governing body approves a memorandum of understanding under the Meyers-Milias-Brown,Act, it becomes binding on both parties. (*Glendale City Employees' Assn. v. City of Glendale, supra,* 15 Cal.3d at 336; *Voters for Responsible Retirement v. Board of Supervisors of Trinity College* (1994) 8 Cal.4th 765.)

The MMBA requires public employers to meet and confer in good faith withan exclusive representative of a bargaining unit *on all matters within the scope of representation.* (Gev. Code § 3505.) The scope of representation consists of "*all matters* relating to employment conditions and employer-employee ***16** relations, including, but not limited to, wages, hours, and other terms and conditions of employment...." (Gov. Code § 3504.) The phrase "wages, hours, and other terms and conditions of employment" is construed liberally. (*International Association of Fire Fighters Union Local 1974, AFL-CIO v. City of Pleasanton* (1976) 56 Cal.App.3d 959.) Thus, a city has the duty to meet and confer regarding issues relating to fringe benefits. (*See, e.g., Public Employees Local 390/400 v. City and County of San Francisco* (1987) 190 Cal.App.3d 419.)

Clearly, there are sound reasons for permitting parties to enter into collective bargaining agreements which modify previously negotiated benefits. Indeed, the negotiation process itself presumes a significant "give and take" of both economic and non-economic contract proposals. (*See, e.g., Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 ["The parties must make a serious attempt to resolve their differences and to reach a common ground"].)

Numerous court decisions regarding collective bargaining confirm the right of unions to bargain on behalf of the employees they represent. (*See, e.g., Young v. Anthony's Fish Grottos, Inc.* (9th Cir. 1987) 830 F.2d 993 ["a union may, in the give and take of collective bargaining, waive the employee's contractual rights"]; *Gardiner v. Sea-Land Service, Inc.* (9th Cir. 1986) 786 F.2d 943 ["the nature of the ***17** 'give and take' process of collective bargaining

suggest that acceptance of a particular package of benefits should be binding on the union members".)[FN3]

> FN3. Again state courts regularly look to the NLRA for authority in MMBA cases. (*E.g.*, *City of El Cajon v. El Cajon Police Officers' Ass'n* (1996) 49 Cal.App.4th 64 [in interpreting the MMBA, California courts may look for guidance to federal case law interpreting parallel provisions of the NLRA].)

In the traditional labor relations field, perhaps nothing is so critical to employees as seniority; certainly it would rival pension benefits as a "fundamental" or "vested" right. Yet, in *International Longshoremen's and Warehousemen's Union v. Kuntz* (9th Cir., 1964) 334 F.2d 165, prospective modifications to the seniority fights of existing employees were permitted through collective bargaining because of the importance of that rocess.

In *Kuntz,* ships clerks brought a class action against their union and their employer for amending the collective bargaining agreement to strip them of a preferred seniority status. The court held that the ostensibly "vested" seniority rights could be impaired or even extinguished by a future agreement. The court explained:
The settlement of a labor dispute, whether accomplished by amendment of the contract or by resort to an already existing contract provision, may affect rights which in other fields are regarded as vested and in a manner which would be deemed "ex post facto." But where the power to bargain is not limited by the contract and since "compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation" [*Ford Motor Co. v. Huffman,* 345 U.S. at 338, 73 S.Ct. at 686] we believe that when "vested rights" are impaired or extinguished in the course of the bargaining, any recourse by the person affected must then depend upon "a ***18** bad faith motive, an intent to hostilely discriminate" on the part of the bargaining representative.

(*Id.* at 171.)

In *Ford Motor Co. v. Huffman,* 345 U.S. 330, a union negotiated seniority rights for returning veterans which, in some cases, superseded those of existing employees. Although this was a serious abrogation of an extremely important right, the U.S. Supreme Court upheld the authority of the union to enter into this agreement. The Court stated:
Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties involved. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals .... Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.

* * *

Compromises on a temporary basis, with a view to longrange advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables.

(*Id.* at 337-338.)

The trial court's decision, if upheld, would create a significant impediment to the MMBA bargaining process. Based on the decision, certain "vested" rights ***19** would be subject to special protection, and could only be negotiated away in exchange for "comparable" benefits. In a typical labor negotiation, dozens of proposals are exchanged, and the ultimately agreed upon package contains tradeoffs that are often difficult, if not impossible, to define as "comparable."

For example, does binding arbitration have "comparable" value to future longevity accrual rates? Is a wage increase in the first year of an agreement "comparable" to a personal leave accrual rate based on 10 years of employment? The standard adopted by the trial court suggests that courts will have to sort through the bargaining history to ensure that "comparable" tradeoffs were made for anything that falls within the definition of "vested" or "fundamental." Other

courts have rejected this approach.

In *Gardiner v. Sea-Land Service, Inc., supra,* for example, several seamen challenged the "maintenance rate" (*i.e.*, guaranteed per diem payments for injured seamen) contained in the collective bargaining agreement between the seamen's union and maritime employers. The maintenance rate was one of many subjects of negotiations between the parties, and was included in the collective bargaining agreement following extensive bargaining. The court held that the bargained for maintenance rate was an enforceable term of the agreement because:
the parties to the agreement included the traditional right to maintenance as a subject of the negotiating process. The resulting collective bargaining agreement incorporated a specific rate of maintenance as one of its terms. We cannot ***20** fairly say that this rate, as a consequence of the normal "give and take' process of collective bargaining, is not entitled to the same reliability accorded to other terms and conditions within the same agreement. The national labor policy of promoting and encouraging collective bargaining agreements would be unduly compromised were we to conclude otherwise.

(*Id.*, 786 F.2d at 949.)

Significantly, the court noted that the challenged provision was not a "*subject for judicial speculation when the rate is part of a total package of wages and benefits resulting from the process of collective bargaining.*" (*Id.*)

In California, proposals to reduce future leave accrual rates, and to eliminate or modify longevity premiums, are *routinely* subject to negotiation. Unions often trade these benefits away at the bargaining table, sometimes for economic increases, sometimes for other reasons. But public entities should not have to line up all negotiated items, isolate those which are "fundamental" or "vested" and then ensure that each union concession is matched by a "comparable" trade off. Nor should courts have to engage in judicial speculation about the trade offs inherent in reaching package economic agreements.

The trial court's ruling directly conflicts with the MMBA. No other court has invalidated a negotiated MOU simply because the Union made concessions on future personal leave and longevity accrual rates. The union negotiated the ***21** concessions at issue, the agreement was ratified by the Union membership, and all parties should be held to the texans of the contract.

B. THE UNION SHOULD BE HELD ACCOUNTABLE FOR ITS AGREEMENT WITH THE CITY OF FONTANA.

The City of Fontana was obligated to negotiate with the union. Pursuant to the MMBA, the union had *exclusive* bargaining rights over various classifications of employees. To allow the union to make and later renege on its own agreement is wrong for at least three reasons.

First, under the MMBA, the contract was binding. (*Glendale City Employees Association v. City of Glendale, supra,* 15 Cal. 3d at 332.)

Second, the union's conduct squarely violates the axiom that "[n]o one can take advantage of his own wrong." (Civ. Code § 3517; *Gavina v. Smith* (1944) 25 Cal.2d 501 ["One who violates his contract has no recourse to equity to support that very violation"].)

Finally, if the union's agreement exceeded its authority, the City should not be held responsible. Rather, the union itself should be answerable to its union membership. (*See, e.g., Vaca v. Sipes* (1967) 386 U.S. 171 [the court may fashion a remedy when a union breaches its duties to the employees it represents]; *Golden v. Local 55, Ass'n of Firefighters* (9th Cir. 1980) 633 F.2d 817, 823-24 [MMBA implies a duty of fair representation by labor unions].)

***22 C. THE COURT OF APPEAL SHOULD CLARIFY THAT CONTRACT PROVISIONS REGARDING FUTURE, UNEARNED COMPENSATION DO NOT CREATE INDIVIDUAL VESTED RIGHTS.**

The trial court held that the previous method of calculating unearned personal leave, longevity bonuses and retiree medical benefits (as negotiated in a MOU between the parties) had acquired constitutional status as "vested contractual rights [which can not] be bargained away to the detriment of the employees, even if such reduction was agreed to and included in a collective bargaining agreement reached as a result of the good-faith negotiations between the City and the employees' chosen labor representative." (Order on Petition for Writ of Mandate, p. 2, ll. 10-17; A 629.) In so finding, the trial court relied on *Phillips v. State Personnel Board* (1986) 184 Cal.App.3d 651, 229 Cal.Rptr. 502, and *California League of Public Employees Ass'n v. Palos Verdes Library District* (1978) 87 Cal.App.3d 135.

As set forth below, these cases should not control the result here.

1. *Phillips* Does Not Support the Trial Court's Decision.

Phillips stands for the proposition that "collective bargaining agreements may not contain provisions abrogating employees' fundamental constitutional fights." Amici agree with this proposition, but it has no application here.

In *Phillips,* the court of appeal struck down a provision of the collective bargaining agreement between a state university and Phillip's union which ***23** mandated the automatic resignation of any employee who missed five consecutive days from work without leave. Phillips filed a lawsuit alleging a deprivation of his procedural due process rights after he was terminated under this provision. The board of trustees argued that there was no constitutional deprivation because the parties had bargained for the automatic resignation provision. The court of appeal disagreed, finding that a union cannot waive an employee's fundamental right to procedural due process.

The *Phillips* court emphasized that a member of a bargaining unit is generally bound by all the terms of a valid collective bargaining agreement unless the enforcement of the agreement would contravene a strong state policy. The collective bargaining provision will not be invalidated simply because it is inconsistent with another law; rather, the law must represent "an extraordinarily strong and explicit state policy." Thus, a collective bargaining provision will be enforced unless it violates "fundamental constitutional rights." *Phillips* has no application to the present case because personal leave, longevity bonuses and retiree medical benefits are not "fundamental constitutional rights."

2. The *Palos Verdes* Court Was Wrong in Characterizing Fringe Benefits as "Fundamental."

A careful analysis of the *Palos Verdes* decision reveals that it is unsupportable.

***24** In *Palos Verdes,* the court cited four cases in support of its holding that the vesting principle extends to nonpension cases. None of those cases suggest that nonpension benefits receive the same protection under the contracts clause as do pension benefits or that nonpension benefits cannot be modified. (See *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 248, 74 Cal.Rptr. 398, 449 P.2d 462 [addressing whether or not a demurrer should have been sustained in an action alleging a breach of a contractual obligation to grant annual wage increases, without comment as to whether such a contract had been created, and no suggestion whatsoever that if it had been, it could not be modified]; *Frates v. Burnett* (1970) 9 Cal.App.3d 63, 69, 87 Cal.Rptr. 721 [simply requiring the Board of Education to comply with its own rules regarding termination]; *Ivens v. Simon* (1963) 212 Cal.App.2d 177, 182, 27 Cal.Rptr. 801 [addressing whether a demurrer should have been sustained without discussing whether or not the five-step pay plan at issue could be modified after the employee began her employment]; *Healdsburg Police Officers Assn. v. City of Healdsburg* (1976) 57 Cal.App.3d 444, 451, 129 Cal.Rptr. 216 [concluding that a city could not violate its own departmental manual, without addressing whether the manual could or could not be modified prospectively].)

The analysis set forth in *Callfornia League of Public Employees Ass'n v. Palos Verdes Library District, supra,* con-

flates two distinct and unrelated ***25** concepts: (1) the due process protections accorded to fundamental constitutional rights; and (2) the constitutional prohibitions against the impairment of vested pension benefits under a contracts clause analysis. The trial court in the present case compounded the error by extending the *Palos Verdes* rule to facts that are simply not analogous. On at least two grounds, the reasoning in *Palos Verdes* - conferring "vested rights" status on such benefits as longevity pay and personal leave - must be rejected.

First, in conferring protection to employee fringe benefits, the *Palos Verdes* court inappropriately borrowed a definition of "fundamental rights" that was used in an entirely different context in *Bixby v. Pierno* (1971) 4 Cal.3d 130, 93 Cal.Rptr. 234. In *Bixby,* the California Supreme Court considered the correct standard of judicial review for decisions of statewide administrative agencies which implicate constitutional due process concerns. The Court was concerned with the identification of "fundamental' or "vested" constitutional rights because such rights receive greater due process protection and, therefore, administrative decisions affecting those rights must be reviewed under a higher standard.

For the limited purpose of conducting its due process analysis, *Bixby* states: "In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation." (*Id.* at 144.) The *Palos Verdes* court ***26** used this test to determine that the three benefits in question were "fundamental" because they "were important to the employees, had been an inducement to remain employed with the district, and were a form of compensation which had been earned by remaining in employment." (*Id.* at 742.) However, the *Bixby* definition of a "fundamental right" has no application in the contract clause analysis purportedly undertaken by the *Palos Verdes* court. (*See, Ginns v. Savage* (1964) 61 Cal.2d 520, 524, 39 Cal.Rptr. 377, 393, at n.2 ["Language used in any opinion is of course to be understood in light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered"].)

Second, economic non-pension benefits should not become transformed into fundamental rights on the basis of their importance to individual employees. In evaluating whether a public employee's vested disability benefits are fundamental within the meaning of the *Bixby* test, the California Supreme Court has explained that "the crucial question is *not the actual amount of harm or damage in a particular case* but the essential character of the right in human terms." (*Dickey v. Retirement Board of City and County of San Francisco* (1976) 16 Cal.3d 745, 129 Cal.Rptr. 289 [*emphasis added*]; *see also Duncan v. Louisiana* (1968) 391 U.S. 145, 149 n. 14 [the issue of whether a right is "fundamental" depends on whether "a civilized system could be imagined that would not accord the particular protection."].) Clearly, the *Palos Verdes* court's ***27** characterization of longevity and personal leave benefits as "fundamental" based on the importance of those benefits to individual employees was wrong.

Amici recognize that certain statutory rights cannot be negotiated away by labor unions or cities. Amici also understand that California law has extended special protections to pension benefits. However, amici do not accept - and urge the court of appeal to reject - the notion that "vested" status may be extended to future, unearned, fringe benefits.

VI. CONCLUSION

The "vested rights" doctrine has a senseless application in the context of labor contracts negotiated pursuant to the MMBA. The trial court improperly extended the doctrine to preclude the unfettered negotiation of future, unearned compensation.

For all of the foregoing reasons, and as explained in the brief by the City of Fontana, the trial court's ruling should be reversed.

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