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BEFORE THE BOARD OF RETIREMENT FOR THE SAN BERNARDINO COUNTY

EMPLOYEES' RETIREMENT SYSTEM

SAN BERNARDINO COUNTY SHERIFF'S EMPLOYEES' BENEFIT ASSOCIATION, on behalf of all employees for whom it is the recognized employee organization and on behalf of all individuals who have retired from positions for which it was the recognized employee organization,

Appellant.

SAN BERNARDINO COUNTY SHERIFF'S EMPLOYEES' BENEFIT ASSOCIATION'S OPENING BRIEF RE: PENSIONABILITY OF ANNUAL LEAVE CASH-OUTS

[Filed concurrently with Declaration of Nancy Tate and Exhibits thereto.]

Meeting Date: June 2, 2022

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I. INTRODUCTION

The San Bernardino County Sheriff's Employees' Benefit Association ("SEBA"), on behalf of all employees for whom it is the recognized employee organization and on behalf of all individuals who have retired from positions for which it was the recognized employee organization, hereby submits this Opening Brief in support of its administrative appeal regarding the treatment by the San Bernardino County Employees Retirement System ("SBCERA") of the pensionability of annual leave cash-outs. Specifically, SEBA disputes SBCERA's determination that members can only include in their final compensation annual leave which is cashable and in earnable in a calendar year. No law, statute, or case requires SBCERA to limit compensation earnable to only annual leave that is earned and redeemed in a calendar year, as opposed to a twelve-month period.

According to SBCERA, the 2013 amendments to Government Code section 31461[1] (part of the California Public Employees' Pension Reform Act of 2013 ("PEPRA")) and *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn*. ("*Alameda*") (2020) 9 Cal.5th 1032, which upheld those amendments as constitutional, must be read to prohibit those employees from including compensation for more than the hours earned and redeemed **in a calendar year** in the calculation of the employee's "compensation earnable" for the purposes of determining the employee's pension. According to SBCERA, the law prohibits utilizing annual leave hours from two different calendar years in an employee's compensation earnable and final compensation. However, SBCERA's position does not withstand serious scrutiny.

SEBA's appeal should be granted because neither the plain language of Section 31461, subdivision (b)(2) and (4), nor any extrinsic evidence, demonstrates that the legislature intended subdivision (b)(2) and (4) to restrict the amount of annual leave that may be included in compensation earnable to a **calendar year**. Both subdivision (b)(2), regarding in service leave cash-outs, and (b)(4), regarding cash outs at separation, use similar language. Section

[1] All subsequent statutory references are to the Government Code unless otherwise indicated.

31461, subdivision (b)(2) excludes from compensation earnable: "Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, **in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period**, regardless of when reported or paid." (Emphasis added.) Subdivision (b)(2) therefore excludes service leave cash outs based on "**each 12-month period during the final average salary period**"; not a calendar year. Subdivision (b)(4) similarly excludes leave cash outs at separation "in an amount that exceeds **that which may be earned and payable in each 12-month period during the final average salary period**." If the legislature intended to restrict annual leave cash outs, whether in service or at separation, to a calendar year, one would expect it to use the term "calendar year" instead of "each 12-month period".

In contrast, with respect the pension benefits of teachers in the California State Teachers Retirement System ("CalSTRS") as set forth in the Education Code, compensation earnable is indeed tied to a specific year— the "school year" (see Education Code section 22115)—which is itself defined as "the period of time beginning on July 1 of one calendar year and ending on June 30 of the following calendar year." (Education Code section 22169.) Had the legislature intended to limit the amount of annual leave included in compensation earnable to a specific period of time such as a calendar year, it certainly knew how to do so. That it did not demonstrates that it had no such intent.

Next, because the *Alameda* court was only faced with determining whether the amendments to Section 31461 could lawfully be applied to individuals who commenced employment prior to PEPRA, it had no occasion to consider whether the County's pre-PEPRA resolutions regarding the pensionability of annual leave cash-outs violated the amendments. Consequently, the Supreme Court has never concluded that PEPRA prohibits the inclusion on leave from separate calendar years for pensionability purposes.

Additional support against SBCERA's position is found within *Alameda* itself. The *Alameda* court held that Section 31461, subdivision (b)(4) (with respect to cash outs at separation) "made no material change in the implementation of [the County Employees

Retirement Law of 1937 (Section 31450 et seq. "CERL")]." (*Alameda, supra*, 9 Cal.5th at p. 1087.) This is because *In re Ret. Cases. Eight Coordinated Cases* (2003) 110 Cal.App.4th 426 ("*Retirement Cases*"), in which the First District Court of Appeal held that cash outs by employees of unused leave **upon separation** from service were not required to be included within the definition of "compensation earnable", and *Salus v. San Diego County Employees Retirement Assn.* (2004) 117 Cal.App.4th 734 ("*Salus*") which adopted the holding from *Retirement Cases*, remained good law at the time PEPRA was enacted. (*Alameda, supra*, 9 Cal.5th at p. 1087.) Subdivision (b)(2), on the other hand, was regarded as a change because there was no statute or case speaking directly to such cash outs. (*Id*. at 1088.) If Section 31461, subdivision (b)(4) made no material change in the implementation of CERL, SBCERA's contention that it and/or subdivision (b)(2) could somehow be read as a clear statement of legislative intent preventing the use of leave redeemed in two different calendar years in "compensation earnable," is dubious.

Consequently, SBCERA has incorrectly limited the compensation earnable of employees. SEBA's administrative appeal should thus be granted. For members with either a 12-month measurement period or 36-month measurement period, SBCERA must include, in compensation earnable, all compensation for annual leave which cashable and earnable in in the respective period, without regard to what is earnable and cashable in a particular calendar year.

II. SUMMARY OF MATERIAL FACTS

A. Statutory Framework

CERL governs the pension systems maintained by many of the state's counties including San Bernardino County. Each county system is administered by a retirement board (such as SBCERA's), which is tasked with implementing CERL's provisions. (*Alameda, supra*, 9 Cal.5th at p. 1052.) Pursuant to Article XVI, section 17 of the California Constitution, the members of the SBCERA Retirement Board owe their highest duty to members of the retirement system. That section states, in pertinent part:

> (b) The members of the retirement board of a public pension or

> retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.

Under CERL, the amount of an employee's pension benefit is determined as a percentage of the "compensation earnable" received by the employee during a representative period of county employment. (*Alameda*, *supra*, 9 Cal.5th at p. 1052.)

The term "compensation" is defined in Section 31460 as "the remuneration paid in cash out of county or district funds, plus any amount deducted from a member's wages for participation in a deferred compensation plan…, but does not include the monetary value of board, lodging, fuel, laundry, or other advantages furnished to a member."

Between 1995 and the enactment of PEPRA, effective 2013, Section 31461, which defines "compensation earnable," stated, in full:

> "Compensation earnable" by a member means the average compensation as determined by the board, for the period under consideration upon the basis of the average number of days ordinarily worked by persons in the same grade or class of positions during the period, and at the same rate of pay. The computation for any absence shall be based on the compensation of the position held by the member at the beginning of the absence. Compensation, as defined in Section 31460, that has been deferred shall be deemed "compensation earnable" when earned, rather than when paid.

(2012 Cal Stats. ch. 296.)

"Final compensation," which is used to determine an individual's pension benefit, is defined in Sections 31462 and 31462.1 for individuals hired before PEPRA, depending on whether he/she uses a one year or three year measurement period. According to Section 31462, it means: "the average annual compensation earnable by a member during any three years elected by a member at or before the time he or she files an application for retirement, or, if he or she fails to elect, during the three years immediately preceding his or her retirement." According to Section 31462.1, it means: "the average annual compensation earnable by a member during any year elected by a member at or before the time he or she files an

application for retirement, or, if he or she fails to elect, during the year immediately preceding his or her retirement."

B. Annual Leave and Retirement for the Safety Unit of SEBA

The Memoranda of Understanding for the Safety Unit represented by SEBA[2] permits its members to cash-out up to forty hours of leave per calendar year. As stated in Section 2(e)(4) of the Leave Provisions section of the MOU:

> On one (1) occasion during each calendar year, an employee who has utilized eighty (80) or more hours of annual leave during the previous calendar year may elect to convert into a cash payment, at the rate of pay (including Incentive Pay) then in effect, up to forty (40) hours of accrued annual leave.
>
> In order to sell back annual leave prior to termination or retirement, an employee must make an irrevocable election (i.e., pre-designation) during the month of December, specifying the number of hours to be sold back from the next calendar year's annual leave time accrual. Such election must be made in a single block of not more than forty (40) hours. During the calendar year following the pre-designation, no more than three (3) requests may be made to cash out the annual leave in a single block of not less than eight (8) hours and no more than forty (40) hours. An employee shall be eligible to cash-out annual leave hours accrued up to the preceding period in which he/she requested the cash-out.

(See Declaration of Nancy Tate, Exh. A.) Subsequently, SEBA entered into two side-letter agreements. The first permitted a one-time election of cashing-out 60 hours of annual leave in December 2020. (Decl. of Tate, Exh. B.) The second side letter changed the MOU provision above to permit the member to elect to cash-out 60 hours, thereby removing the one-time nature of the first side-letter agreement. (Decl. of Tate, Exh. C.)

Members of the Safety Unit are eligible to accrue between 176 hours and 256 hours of annual leave depending on the length of service from the employee's hire date. (Decl. of Tate, Exh. A, Section 2(b) of Leave Provisions.) Thus, Safety Unit members can elect to cash-out 60 hours of annual leave in one calendar year, and then elect to cash-out an additional 60 hours in the same 12-month period during the subsequent calendar year as long as those hours are

[2] Although this appeal is for all individuals represented by SEBA, we use the Safety Unit as an example. The other Unit's MOUs contain analogous language.

earned before they are cashed out.

C. SBCERA'S Calculation of Compensation Earnable

SBCERA calculates retirement benefit allowances based on "Final Average Compensation." For "legacy" members (members whose employment with a participating employer started prior to January 1, 2013, and those members who were first employed by a participating employer after January 1, 2013, but were members of another public retirement system prior to that date and subject to reciprocity under Government Code section 7522.02), Final Average Compensation is determined based on the member's "compensation earnable." SBCERA calculates Final Average Compensation for members based on their highest consecutive measurement (FAC) period pursuant to Government Code sections 31462, 31462.1, 7522.10, 7522.34 and 7522.42, as applicable. Certain members ("Tier 1 Members") are eligible for a 12-month Final Average Compensation period under section 31462.1, and other members ("Tier 2 Members") are eligible for a 36-month Final Average Compensation period under section 31462.

Tier 1 Members may designate a 12-month Final Average Compensation period that includes portions of two calendar years. For example, a Tier 1 Member may designate a Final Average Compensation period extending from July 1 of Year 1 to June 30 of Year 2. Tier 2 Members may designate a 36-month Final Average Compensation period that includes portions of four calendar years. For example, a Tier 2 Member may designate a Final Average Compensation period extending from July 1 of Year 1 to June 30 of Year 4.

D. The Ventura County Decision

Prior to 1997, many, if not all, of the 20 retirement boards operating under CERL calculated employees' pension benefits according to the holding in *Guelfi v. Marin County Employees' Retirement Assn.* (1983) 145 Cal.App.3d 297 ("*Guelfi*"). (*In re Ret. Cases. Eight Coordinated Cases* ("*Retirement Cases*") (2003) 110 Cal.App.4th 426, 433-434.) The *Guelfi* court held that an item of "compensation" under CERL must be received by all employees in the applicable grade or class of position for it to be a mandatory part of a retiring employee's "compensation earnable" and "final compensation" on which an employee's pension is based.

(*Guelfi*, *supra*, 145 Cal.App.3d at pp. 303–307.)

Fourteen years later, in *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483 ("*Ventura County*"), our Supreme Court overruled *Guelfi*'s interpretation of "compensation earnable," holding that "items of 'compensation' paid in cash, even if not earned by all employees in the same grade or class, must be included in the 'compensation earnable' and 'final compensation' on which an employee's pension is based." (*Ventura County*, *supra*, 16 Cal.4th at p. 487.)

With respect to cashed-out accrued vacation, the *Ventura County* court held: "When an employee elects to receive cash in lieu of accrued vacation and the wages or salary the employee would receive during the vacation period, the cash, like the vacation pay the employee would otherwise receive, is part of the employee's 'remuneration' for past services." (*Ventura County*, *supra*, 16 Cal.4th at pp. 497-498.)

E. Retirement Cases

Several lawsuits were filed and coordinated in the aftermath of *Ventura County*, including one brought to determine whether cash outs of unused leave **upon separation from service** must be included in the calculations of "final compensation" for retirement benefits under CERL,. (*Retirement Cases*, *supra*, 110 Cal.App.4th at pp. 434-435.) The trial court held that cash outs by employees of unused leave upon separation from service were not required to be included in the formula for calculating pension benefits. The Court of Appeal affirmed. (*Retirement Cases*, *supra*, 110 Cal.App.4th at pp. 434-437.)

F. PEPRA

Effective January 1, 2013, the legislature adopted PEPRA. Although many of its provisions applied only to "New members,[3]" (see Section 7522.15; 7522.34), some, such as the additions to Section 31461, applied to public employees who had commenced employment prior to January 1, 2013. The additions to Section 31461 included:

[3] Generally, those individuals who became a member of any public retirement system for the first time on or after January 1, 2013, and who were not members of any other public retirement system prior to that date, but also includes others as set forth in Section 7522.04(f).

> (b) "Compensation earnable" does not include, in any case, the following:
>
> [(1)(A)-(C)]
>
> (2) Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.
>
> (3) Payments for additional services rendered outside of normal working hours, whether paid in a lump sum or otherwise.
>
> (4) Payments made at the termination of employment, except those payments that do not exceed what is earned and payable in each 12-month period during the final average salary period, regardless of when reported or paid.
>
> (c) The terms of subdivision (b) are intended to be consistent with and not in conflict with the holdings in Salus v. San Diego County Employees Retirement Association (2004) 117 Cal.App.4th 734 and In re Retirement Cases (2003) 110 Cal.App.4th 426.

(Stats 2012 ch 296 § 28 (AB 340).)

G. *Alameda*

On July 30, 2020, the California Supreme Court issued its decision in *Alameda*, which involved a challenge by plaintiffs as to the application of the changes to Section 31461 to legacy members (i.e., those who commenced employment prior to January 1, 2013). The plaintiffs in *Alameda* claimed that the changes to Section 31461 could not lawfully be applied to them because they conflicted with terms existing in agreements with their retirement systems in effect when PEPRA was enacted and due to the doctrine of equitable estoppel. (*Alameda*, *supra*, 9 Cal.5th at p. 1052-53.) The plaintiffs further argued that the changes to Section 31461 impaired their vested contractual right to receive pension benefits according to the law as it existed prior to PEPRA in violation of Article I section 9 of the California Constitution. (*Ibid*.)

On the issue of the contracts which had been entered into prior to PEPRA, the Court held, "any provision in the settlement agreements that would have required the retirement boards to continue to apply the agreed upon characterizations in the face of contrary legislative changes or authoritative judicial interpretations would have been void. The retirement boards

had no authority to enter into an agreement that would require them to pursue a policy that conflicts with the governing legislation." (*Id*. at 1069.) Notably, the Supreme Court did not hold that the contracts could not have conferred such right. Instead, it advised that, "In order to find such a right, the settlement agreements must be interpreted to require that their classifications of compensation be applied on calculating the pensions of existing employees, regardless of subsequent statutory amendments." (*Ibid*.) The Supreme Court also denied plaintiffs' estoppel claims. (*Alameda*, *supra*, 9 Cal.5th at p. 1068.) With respect to the impairment contentions, the Court set forth a new framework to analyze whether modifications to pension benefits passed constitutional muster. (*Id.* at 1092-1093.) The first step of that analysis requires the Court to **determine whether the modification imposes disadvantages on affected employees, relative to the preexisting pension plan**, and, if so, whether the disadvantages are accompanied by comparable new advantages. The Court ultimately concluded that the additions to the definition of compensation earnable did not violate the California Constitution. (*Id*. at 1103.)

H. <u>SBCERA Alameda Resolution</u>

On or about August 6, 2020, SBCERA adopted a resolution pursuant to *Alameda*. The resolution stated:

> SBCERA currently includes in compensation earnable (i) certain types of pay that were considered in Alameda (standby, on call, and call back) ("PEPRA Exclusions"), and (ii) other types of pay that AB 197 confirmed could or should be excluded from compensation earnable under In re Retirement Cases (2003) 110 Cal.App.4th 426 (employer paid premiums to a third party) ("Alameda Exclusions", and collectively with PEPRA Exclusions, "Litigated Compensation Earnable Pay Codes").

(SBCERA Resolution No. 2020-5.) The resolution then authorized SBCERA to:

> Comply with *Alameda's* directives regarding the Board's lack of authority to include the Alameda Exclusions in Compensation Earnable, and apply that directive to all retiree payroll for individuals who are legacy members who retired on or after July 30, 2020, when the Supreme Court overturned *Guelfi* footnote 6 and SBCERA was thus on notice of that statement of law (including those who will retire on or after the date of this Resolution), effective with the July 30, 2020 retiree payroll.

(*Id*.) Subsequently, SBCERA excluded certain pay codes from inclusion in its calculation of compensation earnable.

As described by SBCERA on its website regarding *Alameda*, SBCERA now excludes from compensation earnable annual leave cashouts over multiple calendar years. Under the section, "What about Cash-Outs?", SBCERA set forth its policy as follows:

> The Alameda case clarified that cash-outs which may exceed what is earned and payable in each 12-month period during a member's Final Average Compensation (FAC) period must be excluded as compensation earnable, effective July 30, 2020. These types of cash-outs are recognized as an Alameda Exclusion. This practice of including two maximum cash-outs from two separate calendar years is sometimes called "straddling" and is clearly prohibited, based on the Alameda decision.
>
> Upon a member's retirement, SBCERA will ensure that any cash-out dollars which are included in the member's FAC are consistent with the clarifications provided by the Alameda decision.

(See https://www.sbcera.org/post/alameda-case-update.)

III. LEGAL STANDARDS

SBCERA's first task in construing a statute such as Section 31461 is to ascertain the intent of the legislature so as to effectuate the purpose of the law. (*Dyna-Med., Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387.) "The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572, quoting *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861; see also 58 Cal.Jur.3d, Statutes, §§ 83-88, 171.) With regard to pension legislation, pension provisions shall be liberally construed with all ambiguities resolved in favor of the pensioner. (*Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1603.)

IV. ARGUMENT

A. The language of Section 31461 cannot reasonably be interpreted to restrict the amount of annual leave to be included in compensation earnable to a calendar year.

As noted above, Section 31461, subdivision (b)(2) excludes from compensation earnable: "Payments for unused vacation, annual leave, personal leave, sick leave, or compensatory time off, however denominated, whether paid in a lump sum or otherwise, **in an amount that exceeds that which may be earned and payable in each 12-month period during the final average salary period**, regardless of when reported or paid." (Emphasis added.) Similarly, subdivision (b)(4) excludes from compensation earnable: "Payments made at the termination of employment, except those payments that do not **exceed what is earned and payable in each 12-month period during the final average salary period**, regardless of when reported or paid." (Emphasis added.) The phrase "each 12-month period during the final average salary period" is unambiguous. In the case of an employee whose final compensation period is 12 months, the phrase means the 12-month period selected by the employee pursuant to either Section 31462.1 or each of the three 12-month periods selected by the employee pursuant to Section 31462 (*i.e.*, the payment cannot exceed what was earned and payable in each of the three 12-month periods).

SBCERA will likely contend that the language of subdivision (b)(2), "each 12-month period during the final average salary period" is ambiguous. Because the language is ambiguous, SBCERA may argue that the Court should look to an extrinsic expression of legislative intent, which SBCERA may argue can be found in the *Alameda* decision. Setting aside whether **legislative** intent can be evidenced from a **judicial** decision, this is a tremendous amount of bootstrapping all built on the faulty premise that the phrase "each 12-month period during the final average salary period" could reasonably be interpreted to mean only a **calendar year**.

First, SBCERA will not be able to show how the phrase "each 12-month period during the final average salary period" could possibly be construed as a **calendar year**. If the legislature had intended to restrict the amount of annual leave to that which could be earned or

redeemed in a calendar year, it could have done so. With respect the pension benefits within CalSTRS, as set forth in the Education Code, compensation earnable is indeed tied to a specific year: the school year. In defining "compensation earnable", Section 22115 of the Education Code makes repeated references to the amount paid "in a school year". The term "school year" is then defined in Education Code section 22169 as "the period of time beginning on July 1 of one calendar year and ending on June 30 of the following calendar year." If the legislature intended to bind the language of Section 31461 to a calendar year, it could have followed its example from the Education Code, either by incorporating a statutory reference to a calendar year or by setting such a limit in Section 31461 itself.

Finally, there is no ambiguity in the phrase "each 12-month period during the final average salary period" within the context of a 12-month final compensation period. The phrase "each 12-month period during the final average salary period" simply allows for the possibility that an individual may have one 12-month period in his/her final compensation period or the individual may have three 12-month periods if his/her final period is 36 months. In the case of an individual with a 12-month final compensation period, "each 12-month period during the average salary period" can only mean the 12 month period selected by the individual. There is no reasonable reading of the phrase "each 12-month period during the final average salary period" that indicates an intent to use only a calendar year.

B. <u>The dicta in Alameda's "Background" section does not advise, let alone mandate, that the amount of annual leave which can be used in compensation earnable is limited to that which is earned and paid in a calendar year</u>.

As there is no ambiguity in the statute, and certainly none which it lends itself to an interpretation tied to a calendar year, SBCERA need not look to any extrinsic evidence of legislative intent. But even if it did, SBCERA cannot point to any extrinsic evidence demonstrating that the legislature intended the phrase "each 12-month period during the final average salary period" to mean a calendar year. Certainly, none can be found in *Alameda*.

First, the language SBCERA relies on in support of its contention that *Alameda* prohibits including a greater amount of annual leave than can be cashed out in a calendar year

is all contained in the "Background" section of the *Alameda* decision, and is therefore dicta. "[G]eneral observations unnecessary to the decision ... are dicta, with no force as precedent." (*Fireman's Fund Ins. Co. v. Maryland Cas. Co*. (1998) 65 Cal.App.4th 1279, 1301.)

However, even the "Background" dicta does not support SBCERA's position. In that section, the Court references a bill analysis prepared in connection with the pre-PEPRA version of Assembly Bill 340 which explained "that the purpose of these changes was to circumscribe CERL's "very broad and general definition of 'compensation earnable'" in order to reduce pension "'spik[ing],'" the manipulation of an employee's pattern of work and pay to produce inflated compensation earnable during the final compensation period. (*Alameda*, *supra*, 9 Cal.5th at p. 1061.) While Section 31461 may have been designed to prevent spiking, that does not equate to a legislative intent to construe Section 31461 to restrict annual leave cash outs to only that which is earned and payable in a **calendar year**.

The "Background" section of *Alameda* also states:

> As to new subdivision (b)(2) of section 31461, many counties permit employees to accumulate unused leave time, such as vacation days and sick leave, and to "cash out" the leave time at a later date by receiving the cash value of the time in return for its surrender. Such leave time is earned in the year in which it is awarded. Yet compensation for cashed out leave time becomes "compensation" for purposes of section 31460 in the year in which the cash value is received, which need not be the year in which the surrendered time was earned. This can lead to a distortion of the pension calculation when leave time awarded in a prior year is cashed out during the final compensation period, **since this has the effect of adding remuneration for a prior year's service to the compensation received for service during the final compensation period**. A similar problem arises with payments made upon termination of employment, excluded by section 31461, subdivision (b)(4), because such payments are generally also compensation for the surrender of accrued leave time. By limiting the amount of "cash out" and termination pay that can be included in compensation earnable to the value of leave time "**earned and payable in each 12-month period during the final average salary period**" (*ibid*.), the Legislature appears to have intended to prevent retiring employees from, in effect, including remuneration earned during prior years in the final compensation calculation.

(*Id*. at 1062, emphasis added.) Here the *Alameda* court is surmising that Section 31461's "earned and payable" language prevents retirees from using remuneration earned in prior years,

which would indeed distort an individual's final compensation. However, this statement certainly does not contain a holding limiting the amount of annual leave to be included in compensation earnable to the amount "earned and payable" in a calendar year.

By way of example, members of SEBA's Safety Unit may accrue between 176 and 256 hours annually. Although they can only now cash out 60 hours per calendar year, members can cash out up to 120 hours in a twelve month period. Yet, SBCERA will only permit 60 of those hours to be included in the final compensation. However, nothing in *Alameda* prohibits members from properly cashing out 120 hours in a twelve-month period and utilizing those hours when calculating his compensation earnable.

Next, the Court in *Alameda* summarized what it characterized as an "additional function" of Section 31461 pointed out by the State:

> The State points to an additional function of section 31461, subdivision (b)(2) and (4). Prior to PEPRA's amendment, even in counties that limited the amount of leave time that could be cashed out in a calendar year, employees were able to double the amount of cashed out leave time received during a final compensation year by designating a final compensation year that straddles two calendar years, for example, July 1 through June 30. By cashing out leave time in the second half of the prior calendar year and the first half of the subsequent calendar year, a retiring employee could double the amount of cashed out leave time received in the final compensation year. **By limiting the inclusion of cashed out leave time to that "earned and payable" in a "12-month period," subdivision (b)(2) and (4) prevent this practice**.

(*Id*. at 1062-1063, emphasis added.) Again, the Court is commenting on how the "earned and payable" requirement prevents an employee from doubling the amount of cashed out leave that could exist if, for example, there were no "earned" requirement. By requiring an employee to both **earn** and **redeem** the requisite leave in a 12-month period, the employee cannot take advantage of two annual leave redemptions to double his/her compensation earnable. Once again, this statement by the Court in the "Background" section of the *Alameda* opinion cannot possibly be read as an absolute restriction to use only annual leave cash outs earned and redeemed in a calendar year. Were that the case, the Court could have said so.

C. <u>The holding in Alameda supports SEBA's position that the changes to Section 31461 do not tie annual leave cash outs to a calendar year</u>.

Finally, it is evident from the actual holding in *Alameda* that Section 31461, subdivision (b)(4) (with respect to leave cash outs at separation) that the legislature could not have intended to restrict annual leave cash outs included in compensation earnable to a calendar year. As part of its analysis regarding whether the modifications to Section 31461 "imposed disadvantages on affected" employees, the *Alameda* court summarized the particular changes to Section 31461. As to the addition of Section 31461, subdivision (b)(4), the Court held:

> Because *Retirement Cases* and *Salus* remained good law at the time PEPRA was enacted, **section 31461, subdivision (b)(4) made no material change in the implementation of CERL**. Subdivision (b)(4) addresses "[p]ayments made at the termination of employment…." Assuming, as the Court of Appeal concluded (*Alameda Sheriff's*, *supra*, 19 Cal.App.5th at p. 104), that this phrase refers to the same type of payments deemed "termination pay" by *Retirement Cases* and *Salus*—that is, payments made after the employment relationship ends—CERL already restricted the pensionability of termination pay when PEPRA became law. As so interpreted, subdivision (b)(4) did not impair county employee pension rights for purposes of the contract clause.

(*Id*. at 1087, emphasis added.) In contrast, the *Alameda* court found that section 31461, subdivision (b)(1), (2) and (3) indeed effected a change in CERL. It explained:

> We have not located any other pre-PEPRA judicial decision that addresses the inclusion in compensation earnable of the remaining items excluded or limited by the PEPRA amendment. We conclude, however, that the ruling in Ventura County was sufficiently clear in including within compensation earnable the items of compensation now excluded or limited by section 31461, subdivision (b)(1) through (3) that these provisions must be considered a change in the law for purposes of the contract clause.

(*Id*. at 1088.)

Given the nearly identical language between subdivisions (b)(2) and (b)(4) of Section 31461, subdivision (b)(2) cannot be said to work a major change in the way annual leave cash outs are treated by retirement systems if Section 31461, subdivision (b)(4) **made no material change in the implementation of CERL**. If the legislature intended the language of subdivision (b)(2) to limit the amount of compensation earnable only to the amount of leave

that could be earned and payable in a **calendar year**, it certainly could have done so without using similar language to another provision that made no material change in the implementation of CERL.

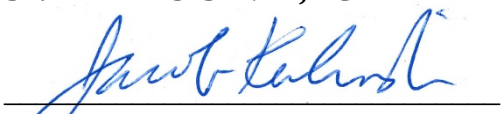
V. CONCLUSION

For the above reasons, SBCERA's limitation of only including annual leave cashouts during a calendar year should be reversed because such a result is not required by either statute or law.

Dated: April 1, 2022

Respectfully submitted,

RAINS LUCIA STERN
ST. PHALLE & SILVER, PC



By: Jacob A. Kalinski
Attorneys for Applicant San Bernardino County Sheriff's Employees' Benefit Association

PROOF OF SERVICE

I am employed in the City of Los Angeles, State of California. I am over 18 years of age and not a party to this action. My business address is Rains Lucia Stern St. Phalle & Silver, PC, 14130 Ventura Blvd., Suite 600, Encino CA 91436.

On the date below I served a true copy of the following document(s):

SAN BERNARDINO COUNTY SHERIFF'S EMPLOYEES BENEFITS ASSOCIATION'S OPENING BRIEF RE: PENSIONABILITY OF ANNUAL LEAVE CASH-OUTS

on the interested parties to said action by the following means:

☐ **(BY MAIL)** By placing a true copy of the above, enclosed in a sealed envelope with appropriate postage, for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☐ **(BY OVERNIGHT DELIVERY)** By placing a true copy of the above, enclosed in a sealed envelope with delivery charges to be billed to Rains Lucia Stern St. Phalle & Silver, P.C., for delivery by an overnight delivery service to the address(es) shown below.

☐ **(BY FACSIMILE TRANSMISSION)** By transmitting a true copy of the above by facsimile transmission from facsimile number (310) 393-1486 to the attorney(s) or party(ies) shown below.

☐ **(BY MESSENGER)** By placing a true copy of the above in a sealed envelope and by giving said envelope to an employee of First Legal for guaranteed, same-day delivery to the address(es) shown below.

☐ **(BY HAND DELIVERY)** By personal delivery of a true copy of the above to the attorneys or parties shown below

☒ **(BY E-MAIL or ELECTRONIC TRANSMISSION)** I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable period of time, after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

DATED: April 1, 2022

/s/ Michele Hengesbach
Michele Hengesbach

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