FRONTAL ASSAULT ON THE VESTED PENSION RIGHTS DOCTRINE

By Gregg Adam

California's First District Court of Appeal in San Francisco recently issued a highly controversial decision in *Marin Association of Public Employees v. Marin County Employees' Retirement Association* (A139610, August 27, 2016). The Court ruled that an employer may reduce pension benefits, before retirement, so long as the pension benefit remains "reasonable." The Court offers no guidelines for what is a reasonable change and what is an unreasonable one.

The decision is an undisguised, frontal assault on the so-called "California Rule" which has long-protected vested pension rights. Anti-pension advocates are prematurely seizing on this ruling as a "game changer."

MAJ represents **Marin County Fire Department Firefighters' Association** and **Marin County Management Employees Association** in the case. The Leonard Carder and Weinberg, Roger & Rosenfeld firms represent other unions involved in the case.

The facts are simple. Since the landmark *Ventura* case in 1997, the Marin County Employees' Retirement Association (MCERA) has included standby pay, administrative response pay, call-back pay and "cash in lieu" pay as "compensation earnable" under Government Code section 31461. Both employees and the County employer paid contributions based upon the inclusion of these premiums.

After the Legislature passed the California Public Employees' Pension Reform Act of 2013 (PEPRA), however, MCERA determined that it would no longer include those premiums as compensation earnable for both existing and new employees.

Multiple Marin County labor unions filed suit. Everyone accepts that pension benefits may be reduced, or even eliminated, for new employees, before they begin work. However, a massive body of California decisions going back at least four decades have universally held that pension benefits for existing employees cannot be changed once they start work unless the pension plan specifically allows for such change. Relying on this unbroken line of cases, the Marin unions argued that MCERA could not discontinue the inclusion of the various premiums as compensation earnable for classic employees.

The Court of Appeal disagreed. Dispensing with the arguments made by MCERA and the California Attorney General's Office (which intervened to defend PEPRA), the Court of Appeal ploughed a new furrow and concluded that public employee pensions may be modified, before retirement, so long as the pension benefit remains "reasonable."

The Court disputed what is perhaps *the* central tenet of vested pension law: that if a change in the pension system results in a disadvantage to employees, it "***must* be accompanied by comparable new advantages**." It delved into whether, when the California Supreme Court used the word "must," it really meant "must." The Court concluded that the Supreme Court meant only "should." And since "should" really just means "ought to," it violates no legal right for the pension promise to be broken so long as the pension remains reasonable.

The Marin unions are considering their next steps, which includes the possibility of asking the California Supreme Court to review the case and provide guidance. This seems appropriate given the Court of Appeal's break with precedent, and reconfiguration of what has been a settled body of law. Just last year, a different panel of the First District Court of Appeal in *Protect Our Benefits v. City and County of San Francisco* held just the opposite in declaring that a charter amendment which eliminated a supplemental cost of living adjustment for retirees was unconstitutional. That panel restated the rule that if a change in the pension system results in a disadvantage to employees, it "must be accompanied by comparable new advantages."

The Court of Appeal decision in *Marin Association of Public Employees v. Marin County Employees' Retirement Association* is a call to arms that this not be the last chapter written.