Study N-200 December 7, 1995

Second Supplement to Memorandum 95-67

**Judicial Review of Agency Action: More Comments on Tentative Recommendation**

Attached to this memorandum are comments of Robert J. Bezemek opposed to the proposed "compromise" on the independent judgment test.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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December 7, 1995

**BY FAX: 1-415-494-1827**

California Law Revision Commission
4000 Middlefield Road, Suite D-2
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**Re: Tentative Recommendation -- Judicial Review of Agency Action/Opposition to Proposed "Compromise" on the Independent Judgment Test**

Dear California Law Revision Commission:

I am writing because I am unable to attend your meeting on December 8, 1995, where you will consider the Tentative Recommendation ("TR") regarding judicial review of agency action. I have been involved in a long trial involving the dismissal of a tenured teacher, and the hearing is occurring on December 8.

I am writing because the December 1, 1995, Memorandum ("Memo") prepared by your staff misunderstands California labor law, misrepresents the impact of the elimination of the independent judgment test for dealing with fundamental or vested rights, and proposes a change which would deprive employees throughout the State of rights they enjoy under statutes and cases. I continue to oppose, in the strongest possible terms, your tentative recommendation to apply the substantial evidence test in all cases involving ordinary mandate under C.C.P. §1085. The "compromise" of providing substantial evidence review in C.C.P. §1094.5 cases for agencies that adopt the Administrative Adjudication Bill of Rights is not satisfactory. The laws which govern tenured teachers in 70 community college districts, 1000 school districts, and the University of California require application of the independent judgment test. Taking away that test would not be "compensated" by application of the administrative adjudication bill of rights. Local agencies such as cities, counties, and special districts also have special provisions for adjudication of employee rights. To take away the independent judgment test and to substitute the administrative adjudication bill of rights would significantly reduce the protections afforded these employees.

As I explain in this presentation, your review of agency fact finding is flawed because it begins with the erroneous premise that California is the "only jurisdiction" in the United States that uses the independent judgment standard for judicial review of agency action. Professor Asimow's conclusion on this subject should more appropriately be characterized as science fiction rather than scholarly research, and are unworthy of credence. For the reasons set forth below I strongly recommend that you return the "standard of review" subject to your staff for further consideration and comment. In this regard I also wish to emphasize that the Law Revision Commission apparently did not solicit the views of the State Bar of California, Labor and Employment Law Section, regarding the proposed changes in C.C.P. §§1094.5 and 1085. The members of this section have a direct interest in this subject matter. However, the Public Law Section, which is composed principally of county counsels and other management representatives was contacted. It is essential to a fair resolution of this matter that the Labor and Employment Law Section have an adequate opportunity to participate in this review.

## I. CALIFORNIA IS NOT ALONE IN USING THE INDEPENDENT JUDGMENT STANDARD FOR JUDICIAL REVIEW OF AGENCY ACTION.

The tentative recommendation dated August 18, 1995, states that California has an antiquated provision for judicial review of agency action. (TR: p. 3) The TR is replete with contentions that the "awkward hybrid" of review in California is the result of historical developments such that California is unique. The TR mistakenly asserts:

> "California is the only jurisdiction in the United States that uses the independent judgment standard for judicial review of agency action." (TR: p. 9)

It is obvious that this mistaken analysis is central to the proposal of your consultant Michael Asimow. For instance, Professor Asimow also mistakenly makes the same assertion in his law review article *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA Law Review 1157 (1995), at p. 1161, 1163-1164 (cited herein as "Asimow"). In his article, Professor Asimow wrongly asserts:

> "In California (*but not elsewhere*), the single most controversial issue concerns the scope of judicial review of agency findings . . .

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> The independent judgment approach is *idiosyncratic to California*. It is not followed by *any other state* or the federal government." Id. at 1161, 1163 (italics supplied except for last italics).

When I first read Professor Asimow's statement in the TR at p. 5, that California is the only jurisdiction that uses the independent judgment standard, I was skeptical as Professor Asimow offered no citation for this broad, general, unequivocal statement. I assumed that I would find authority for this proposition in his UCLA article, since it is cited at page 3 of the TR. I was also skeptical because of my general knowledge of other states -- having formerly worked for the National Labor Relations Board in Pennsylvania, the U.S. Department of Justice, Civil Rights Division, the California Agricultural Relations Board (where I served as Regional Attorney in Fresno), and Van Bourg, Weinberg, Roger & Rosenfield (representing hundreds of unions), and at my own firm, I have acquired, in over 25 years, an extensive labor law knowledge (and, I have taught labor law).

When I finally obtained a copy of Professor Asimow's article I was dumbfounded to find that he again offered no citation to support his claim at p. 1163 that the independent judgment approach is "idiosyncratic" to California and is not followed "by any other state or the federal government." I now conclude that because Professor Asimow is a UCLA law professor and published his article in the UCLA Law Review, that he was not held to the same standard that might be expected had he published his article at another institution. I expected a lengthy footnote describing the laws of other jurisdictions -- there was none. More significantly, his claim is wrong when it comes to judicial review of employee rights cases. Although he may be an expert in business, tax and land use, his article discloses a stunning unawareness of the law which governs employee relations in California, in other states, and in the federal system.

For this Commission to rely upon this unsupported and inaccurate statement as one of the principle underpinnings of the recommended change in the scope of review would be unprecedented and unjustifiable.

Professor Asimow writes in his article that California uses an independent judgment approach, and that this approach is not followed by any other state or the federal government. No authority is cited for this general proposition, which is a

crucial underpinning of his argument that the independent judgment approach should be done away with. I am certain many states use the independent judgment standard to review vested rights. In my brief review this week, and based on my experience, please consider a sampling:

1. Colorado has a law known as the Teacher Employment, Compensation and Dismissal Statute. In §22-63-302, the procedural for dismissal of tenured teachers, and judicial review is discussed. A copy of the annotated Colorado statute is attached. The statute provides that a teacher facing termination should be given written notice of the charges, and a hearing before an administrative hearing officer. The hearing officers are impartial individuals with experience in conducting hearings and with experience in labor or employment matters. The employer carries the burden of proof. The administrative hearing officer makes a recommendation to the employer, enters a written order, which may dismiss or retain the teacher. If the school board dismisses the teacher, the teacher may file an action for review in the court of appeals. Two standards apply, depending upon the situation:

a. If the decision of the board to dismiss the teacher was made over the hearing officer's recommendation of retention, the court of appeals, which will either affirm the decision of the board or affirm the recommendation of the hearing officer, based upon the court's review "of the record as a whole and the court's own judgment as to whether the board's decision or the hearing officer's recommendation has more support in the record as a whole." (§22-63-302 (10)(c).) (emphasis added)

b. If the decision of the board to dismiss the teacher was in accordance with the recommendation of the hearing officer, the court of appeals shall review the record to determine whether the action of the board was arbitrary, capricious, or legally impermissible.

As is plainly evident, Colorado employs the independent judgment test for dismissals of a tenured teacher where the hearing officer's recommendation was in favor of retention, and the board's decision was in favor of dismissal. Where both the board and the hearing officer recommend termination, the standard is one of "arbitrary or capricious" action, or whether the dismissal was legally impermissible. Thus, Colorado employs the independent judgment test for the termination of tenured teachers in the above situation.

2. In federal service, employee claims of discrimination in employment decisions often go before an ALJ. But, federal employees, if they lose, are entitled to de novo federal court hearings. (5 U.S.C. §7703.)

3. In his article Professor Asimow himself writes that "some states utilize independent judgment for particular situations." (Asimow, Id. at 1164, fn. 13, citing Texas)

Cases dealing with employee rights are different than tax and land use cases. Professor Asimow's article suggests that every type of situation should be treated with a broad "substantial evidence" brush. In wrongly believing that California is the only state to require a review in court to exercise "independent judgment" this Commission is acting on an incorrect premise.

## II. THIS COMMISSION'S VIEW OF EMPLOYMENT LAW IN CALIFORNIA IS FLAWED.

I have read with great concern Professor Asimow's article where it projects an incorrect view of California employment and labor law. There is only one area in which I agree with Professor Asimow -- the law should provide that reviewing courts defer to credibility determinations of independent administrative law judges or arbitrators. Professor Asimow is correct that there is a split of authority on this subject. (See Asimow, Id. at 1168, and fn. 35) There are several cases which convincingly explain that credibility determinations should be made by the finder of fact who observed the witnesses, not a later reviewing court. But with this one exception, his representation of California law is flawed.

### A. There is a Legitimate Basis For Requiring The Independent Judgment Test For The Dismissal of Tenured Teachers And the Substantial Evidence Test For The Non-Retention or Non Rehire of Probationary Teachers.

Professor Asimow writes that an administrative decision having a pecuniary impact does not always call for independent judgment review, citing Turner v. Board of Trustees 16 Cal.3d 818, 129 Cal.Rptr. 443 (1976) (*dismissal* of probationary teacher *for cause*). This characterization of the Turner case is inaccurate -- Turner was not dismissed for cause -- he was "not rehired" at the conclusion of his contract, and denied a third probationary year of employment. This is a significant difference recognized by union and management attorneys -- probationary teachers are afforded lesser rights than tenured

teachers. Professor Asimow writes that he defies anyone to provide a "principled explanation" or to "distinguish the pecuniary impact cases which do and do not call for independent judgment." Id. at fn. 51, p. 1173. I have done so, and virtually any labor lawyer can provide this explanation -- it is Professor Asimow's unfamiliarity with labor law which causes him to misunderstand the simple explanation. For your edification I attach one page of the Turner decision which clearly explains the distinction between the rights afforded tenured versus probationary faculty. I can only surmise that like the trial court judge who, in a substantial evidence case may entrust the reading of the transcript to a "law clerk," Professor Asimow relied on an assistant and did not himself read every word of Turner.

Professor Asimow continues to reveal his unfamiliarity with labor law on p. 1174, and especially at fn. 55 where he writes:

> "The scope of review of school board decisions involving teachers is particularly problematic. Both a school district and a teacher receive independent judgment review of an ALJ's decision reversing or upholding the discharge of a permanent teacher . . . However, an ALJ's decision upholding a school district's decision not to rehire a probationary teacher for cause is generally reviewed under substantial evidence. (Citing Turner) . . . Why is the probationary teacher's career of less concern than the many other agency decisions reviewed under independent judgment such as a denied application for welfare or an unemployment insurance decision against the employer?"

I am forced to ask, what rock has Professor Asimow been hiding under? Any labor lawyer in their first year learns that the distinction between the rights afforded permanent (or tenured) employees and probationary (or temporary) employees is firmly embedded in federal and state labor law, the common law of arbitration, and other laws regulating employment. Thus, in their seminal work on arbitration, How Arbitration Works, 4th Ed. BNA, Elkouri & Elkouri (1985), the authors write about the lesser standards which apply to probationary employees:

> "It has been held that where, by the agreement, new employees are not to have seniority rights until completion of a

> probationary period, and where the agreement is otherwise silent as to management's rights with respect to new employees, they may be discharged for any reason except discrimination." Id. at 654.

I am astonished that Professor Asimow is unable to distinguish between the situation presented by Kerrigan v. FEPC 91 Cal.App.3d 43, 154 Cal.Rptr. 29 (1979) (denial of job based upon alleged age discrimination), and Turner v. Board of Trustees, supra. Even probationary teachers have a right to "independent judgment" when they claim discrimination, because their discrimination claim is brought under public laws which vindicate the state's interest in the workplace being free from discrimination based upon race, sex, age, disability, etc.

Professor Asimow writes at p. 1177 that under California law a reviewing court ignores an ALJ's proposed decision once it has been rejected by an agency head, citing Compton v. Board of Trustees 49 Cal.App.3d 150, 157-158, 122 Cal.Rptr. 493, 498 (1975). He is correct that in the singular case of a layoff of a tenured faculty member, the rejected proposed ALJ decision, by statute, is not precedent when there is independent judicial review of the record at the trial court level. But if we are speaking of the termination of a tenured teacher, then the ALJ's decision has a "identifiable function" in the judicial review process -- the ALJ's decision is final at the administrative level pursuant to Education Code §87674 et seq. Then it is subject to independent review by a trial court. Likewise, the decision of a "Commission on Professional Competence" (composed of an ALJ, a teacher representative and a management representative) in public school terminations (see Education Code §44932 et seq.), is also "final" at the administrative level, and then subject to independent judgment review in connection with the dismissal of a tenured faculty member.

Because of his unfamiliarity with state and federal labor law, Professor Asimow has based his conclusions on incorrect premises and mixed apples and oranges. Different standards apply to permanent as opposed to probationary teachers. See, e.g., Mt. San Antonio College Faculty Assn. v. Board of Trustees (1981) 125 Cal.App.3d 27, 33-35, 177 Cal.Rptr. 810 (substantial evidence applied to review District evaluation procedures for probationary faculty).

**III. ELIMINATING THE INDEPENDENT JUDGMENT REVIEW FOR VESTED RIGHTS WILL RESULT IN PERFUNCTORY, RUBBER-STAMP TYPE COURT REVIEW AND WILL DEPRIVE EMPLOYEES OF FUNDAMENTALLY VESTED RIGHTS.**

Professor Asimow explains that the independent judgment test makes "exceptional demands on trial court judges." He honestly describes how these demands are "far greater than those imposed by the substantial evidence test." (Asimow, Id. at 1185) As he puts it,

> "Independent judgment requires an exacting scrutiny of every word in the record, and sometimes the transcripts are very lengthy."

Judges exist to judge. If this Commission wants to make it easier to take away vested rights of permanent employees, then by all means pass a law stripping them of independent judgment review. It would be much easier for judges if they need not read every word! As Professor Asimow explains, if there is substantial evidence review then the judges can turn over the work to a law clerk or legal assistant:

> "One [superior court judge] told me that he believes that he cannot entrust the reading of the record to a law clerk or legal assistant in an independent judgment case. He must read every word himself, just as he would hear every word in a case in which he were the trial judge." Id. at fn. 66, p. 1185. (emphasis added)

People with fundamentally vested rights, such as retirement health benefits, should be entitled to have a judge hear every word when they are at risk of losing their vested right; they certainly should enjoy as much attention as other civil or criminal litigants.

Professor Asimow cleanly discloses his purpose by explaining that independent judgment review is "inefficient" because it "encourages more people to seek judicial review than would do so under substantial evidence." His comments at p. 1185 of his Article completely undermine his earlier claim that the "test of substantial evidence on the whole record is not a toothless standard which calls for a court merely to rubber-stamp an agency's findings if there is 'any evidence' to support them." (Asimow, Id. at 1178) In fact, the substantial evidence test does precisely that, something Justice Grodin explained to me

nearly two decades ago in a writ case in which he upheld a dismissal. As Asimow candidly explains at p. 1185:

> "If the agency has presented a strong case and nothing suggests any irregularity in the proceedings, judicial review under a substantial evidence standard will probably be unavailing. People will not wish to pay lawyers to seek review . . . " (emphasis added)

Given this result, you may be assured that labor and other organizations will mobilize to defeat your proposal to strip them of hard-fought and well-earned rights.

Professor Asimow also wrongfully claims that independent judgment review "substitutes the factual conclusions of a non-expert trial judge for the expert and professional conclusions of the administrative law judge and agency heads." Id. at 10. We need independent judgment review when vested rights are involved -- trial courts are far better situated that agencies to vindicate constitutional rights or decide controversial cases. I vividly recall a case I tried at UCLA, where a probationary (and there was an eight-year probationary period) professor was "non-rehired" and filed a "grievance" with the "Committee on Privilege and Tenure," an assembly of "lay" faculty (including two law professors from UCLA) who had to decide if his rights had been violated. The professor claimed that he was denied tenure because of discrimination. The hearing began and the professor carried the burden of proof. I cross-examined senior faculty who were involved in the decision not to grant him tenure. The "expert" Committee on Privilege and Tenure became extremely upset with my questioning, because I was "impugning" the reputations of fellow senior faculty by "suggesting" that they were biased. After just a day the Committee adjourned the hearing before my client had a chance to testify -- a month or so later we received a notice that the Committee had issued its decision denying the grievance, but had deemed the decision itself "confidential," and refused to provide us with a copy. The "experts" may have been familiar with the subject matter of the professor, but they disclosed their complete unfamiliarity with basic principles of constitutional law and discrimination law which forbid "not rehiring" a professor because of his religious beliefs or ethnic status.

Over the last twenty years I have represented scores of University of California faculty who were denied tenure (not rehired). Among others I represented a female U.C. Berkeley math

assistant professor. In its history the then 70-person Math Department had never granted tenure to a female, except for the deathbed conferral of tenure upon a female lecturer who had won the equivalent of the Nobel Prize in math. I vividly recall the testimony of my client and others at the hearing before the Committee on Privilege and Tenure -- she should not be a mathematician because "she belonged in the kitchen," the fact that she had gotten tenure at Oxford University was of "no consequence," and "women can't do math." The "lay" Committee on Privilege and Tenure made up of expert professors decided that the members of her department had a constitutional right to express these views and it was not for the committee to question their motives as expressed by these "opinions," over which academicians could "legitimately" disagree. Judges provide a bulwark against improper agency actions and the independent judgment test is essential to their job.

**A. The California Office Of Administrative Hearings Is Not The "Envy" It Is Made Out To Be By Professor Asimow.**

In his article Professor Asimow writes that California's "Office of Administrative Hearings" is the "envy of most other states and the federal bar." He explains that our "independent ALJ's provide a vitally important buffer against regulatory zeal or harassment." For labor lawyers this statement is unbelievably inaccurate. I recall the termination of Steven Wittman, a permanent employee fired by the State Teachers' Retirement System for allegedly "blowing the whistle" on an improper practice of STRS to charge incorrect interest to teachers who left STRS and then returned. We had a hearing before a "independent" ALJ in Sacramento. Several co-workers of Mr. Wittman attended the hearing, and many of them wore buttons expressing their support for Steve Wittman. Indeed, the buttons simply said things such as "support Steve Wittman."[1] After the hearing was over, the ALJ upheld the termination of Wittman, adding an uncharged, unlitigated additional ground, Wittman had "disrupted" the hearing because some of his supporters had attended and worn buttons exhibiting their support for him. We took the matter to court and, on independent judgment review, the decision was reversed and Mr. Wittman was reinstated with backpay.

[1]The right to wear political buttons is well established in federal and California law. See, e.g., Bezemek, "Don't Push My (Political) Buttons" CPER, University of California, April 1995, Vol. 111, at p. 11.

I also vividly recall a hearing in Marin County where I represented 80 teachers who were laid off because they were pursuing litigation against the Marin Community College District. The teachers claimed that the District had been systematically ignoring Education Code §84362, the "Fifty Percent law" which requires that fifty percent of a college's "current expense of education" be spent on teacher salaries (this is a statute designed in 1851 to prevent the overhiring of administrators, and the concentration of State resources towards actual instruction). The teachers in Marin, through their Union, the United Professors of Marin, had sued the District for violating the law and sued the State Chancellor's Office for not enforcing it. In order to "persuade" the teachers to drop the lawsuit, the District announced that it was going to lay off 80 of them unless they dropped the lawsuit. I went to a hearing before an administrative law judge, and attempted to prove that the basis for the layoff of the 80 teachers was their participation in a form of free speech -- litigation. Litigation has been recognized by the California State and federal courts as protected speech. The administrative law judge refused to accept testimony on this subject, and the teachers were all fired. We took the matter to court. Eventually the Superior Court issued a writ of mandate, applying the independent judgment test and ordering the re-employment of all of the teachers. The District eventually settled the underlying fifty percent lawsuit, as did the state, agreeing to thereafter comply with the law, and many teachers were made whole for losses they had suffered. (See, e.g., Bezemek, "Forum: Two Views on Education's Fifty Percent Law" CPER, University of California, Vol. 66, (1985), p. 19.)

Our experience with administrative law judges is mixed. In teacher layoff cases they routinely rubber-stamp the decisions to layoff unless there is a Court of Appeals decision on point supporting our position. In termination cases we find that some of the administrative law judges are familiar with education and employment issues, and others are not as familiar. Thus, we still need independent court review in employment situations. (There is one exception in A.B. 1725, Education Code §87610.1, as counsel to a Task Force to reform education laws, I supported, indeed wrote, much of a statute providing labor arbitration by independent labor arbitrators, in decisions to not promote probationary community college faculty to tenure. My proposal for final and binding arbitration was opposed by Districts which wanted independent judgment review.)

## IV. APPLICATION OF THE ADMINISTRATIVE ADJUDICATION BILL OF RIGHTS, GOVERNMENT CODE §11425.10 et seq. WILL NOT REPLACE INDEPENDENT JUDGMENT REVIEW.

There are two reasons why substitution of the administrative adjudication bill of rights will not adequately protect employees if the independent judgment test is eliminated. First, the TR still proposes to replace the independent judgment test with substantial evidence for all cases involving ordinary mandate under C.C.P. §1085. Second, the administrative adjudication bill of rights does not go far enough to protecting employees in cities, counties, special districts, school districts and community college districts (except for classified employees), because of differing systems of employment relations which exist in these venues.

### A. The Independent Judgment Test Must Be Retained For Ordinary Mandate Actions.

Where a vested right is involved, the trial court uses its independent judgment to determine the facts in C.C.P. §1085 actions. These actions are almost like state court breach of contract cases, but with the simplified, faster and more efficient review of mandamus.

The simplest way to explain the need for the independent judgment test in ordinary ("vested rights") mandate cases is to describe an actual case which has occurred in the Contra Costa Community College District. I attach a copy of the Appellate Court decision, just issued, for your review. In 1972 the Governing Board of the District agreed to provide health insurance premium benefits for all employees, upon their retirement, if they worked long enough. In 1983 the District terminated some of the benefits, forcing retirees to pay the premiums. As a result, some retirees were disqualified from receiving any health benefits, and others were subjected to costs so great that they had to drop their health insurance.

We filed a lawsuit for a class consisting of approximately 125 retirees who either lost their health benefits or found that the benefits were substantially impaired. One of the fact questions before the trial court on our ordinary mandate action under C.C.P. §1085 was whether the District had promised retirement health benefits in 1972. Not surprisingly, a number of District administrators and Board members asserted that the promise they had made in 1972 was different than that which our 150 retirees distinctly recalled. The court independently reviewed the evidence and concluded that a promise had been made

and breached. (The appeals court upheld the trial court.) Under the proposed TR, the trial court would have to give "substantial evidence" review to the current argument of the District on what benefits it had promised in 1972. Because the case distinctly involved vested rights -- retirement health benefits -- the trial court independently reviewed the matter and concluded the employees had been promised retirement health benefits, including a no-cost health plan after they retired. Because "some evidence" existed with respect to the ambiguous promise, the trial court might well have found under the substantial evidence test that the retirees had not been promised these health benefits. The District in this case was an adversary -- its evidence as to what it had promised should not automatically be given more weight than the evidence presented by the retirees. This is a classic case in which the independent judgment test is critical to assure fair and neutral review. It is wrong to assume that the internal agency's review in this situation is entitled to any more weight than the retirees claims. Yet the Memo response to my earlier letter shows that the TR would create just such an unfair system:

> "For local agency action that is not a 'decision,' substantial evidence review will apply under subdivision (b)." (Memorandum, p. 6)

For the reasons specified in my initial letter of November 15, 1995, and herein, you should not require substantial evidence review in all ordinary mandate cases. This is not a situation in which "one size fits all." The scope of review should depend on the right at stake.

**B. The Application of the Administrative Bill of Rights Will Be of No Assistance in Layoff Hearings Under Education Code §§44949 and 87740, To Compensate For The Loss of the Independent Judgment Test.**

We already have almost the equivalent of the administrative adjudication bill of rights for layoff hearings of tenured faculty under Education Code §§44949 (1000 school districts) and Education Code §87743 (70 community college districts). The application of the bill of rights will not change the fact that the final decision is the result of a recommendation by an administrative law judge to the district's governing board. In layoff hearings, the "investigative, prosecutorial, and advocacy function" is performed by the administrators of the district (chancellor or superintendent, personnel director), and the decision-making is by the school board. Nothing will ever change

the fact that these school boards always follow the advice of their personnel director and superintendent and uphold the terminations that the administration recommends to them. Even though the presiding officer is an ALJ, his decision is merely a recommendation.

Thus, though most of the protections of Government Code §11425.10 now apply, nothing will change the fact that the only time we get an independent review is in the trial court on a petition for writ of mandate under C.C.P. §1094.5.

**V. THERE IS A LEGAL QUESTION THAT YOU CAN STATUTORILY REVERSE INDEPENDENT JUDGMENT REVIEW OF VESTED RIGHTS.**

We submit that the TR, and Professor Asimow misunderstand the Tex-Cal case. If the basis for current independent judgment review of vested fundamental rights of employees is based on the state or federal constitution, then legislation cannot strip employees of this important right. Further, even if the legislature could statutorily erase independent judgment review, current employees who enjoy this right may have a fundamental vested right in the existence of the independent judgment test and it may not be possible for that right to be taken away except as to newly hired individuals. From what I can tell, neither of these legal issues has been reviewed, considered or resolved by the Commission. Thus, if the Commission is to recommend the elimination of the vested rights test, and the legislature ultimately adopts this finding, it is virtually certain to generate litigation over whether there is legislative authority for such a radical change in California law.

**VI. CONCLUSION.**

For all of the above reasons, I urge you to return to your staff for further study and comment the question of standard of review.

Respectfully submitted,

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By _____
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Enclosures

"Immorality" must be related to teacher's fitness for service. The statutory ground of immorality, taken in conjunction with the other grounds of physical and mental disability, incompetency, neglect of duty, conviction of a felony, and insubordination, clearly implies a standard that is directly related to the teacher's fitness for service. Weissman v. Board of Educ., 190 Colo. 414, 547 P.2d 1267 (1976).

Appellant's actions cannot constitute immorality within the meaning of the statute unless these actions indicate his unfitness to teach. Weissman v. Board of Educ., 190 Colo. 414, 547 P.2d 1267 (1976).

**Considerations in determination of unfitness.** In determining whether the teacher's conduct indicates an unfitness to teach, the board of education may properly consider such matters as the age and maturity of the teacher's students, the likelihood that his conduct may have adversely affected students and other teachers, the degree of such adversity, the proximity or remoteness in time of the conduct, the extenuating or aggravating circumstances surrounding the conduct, the likelihood that the conduct may be repeated, the motives underlying it, and the extent to which discipline may have a chilling effect upon either the rights of the teacher involved or other teachers. Weissman v. Board of Educ., 190 Colo. 414, 547 P.2d 1267 (1976).

Most persons of ordinary intelligence would have noticed, even from the broad wording of this section, that certain acts are prohibited, including inter alia the intimate touching of minor female students by a male high school teacher. Weissman v. Board of Educ., 190 Colo. 414, 547 P.2d 1267 (1976).

Whenever a male teacher engages in sexually provocative or exploitive conduct with his minor female students a strong presumption of unfitness arises against the teacher. Weissman v. Board of Educ., 190 Colo. 414, 547 P.2d 1267 (1976); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981).

### E. Insubordination.

Insubordination should ge given its commonly-understood definition of a willful failure or refusal to obey reasonable orders of a superior who is entitled to give such orders. Ware v. Morgan County School Dist. RE-3, 719 P.2d 351 (Colo. App. 1985); Lockhart v. Arapahoe County School Dist. No. 6, 735 P.2d 913 (Colo. App. 1986).

Where there is evidence that petitioner willfully refused to participate at any time in hall supervision duties when ordered to do so by this principal and where in the interest in maintaining discipline and order in public schools such order was reasonable, the board correctly found that petitioner was insubordinate. Lockhart v. Arapahoe County Sch. Dist. No. 6, 735 P.2d 913 (Colo. App. 1986).

**22-63-302. Procedure for dismissal - judicial review.** (1) Except as otherwise provided in subsection (11) of this section, a teacher shall be dismissed in the manner prescribed by subsections (2) to (10) of this section.

(2) The chief administrative officer of the employing school district may recommend that the board dismiss a teacher based upon one or more of the grounds stated in section 22-63-301. If such a recommendation is made to the board, such teacher, within seven days after the board meeting at which the recommendation is made, shall be given a written notice of intent to dismiss. The notice of intent to dismiss shall include a copy of the reasons for dismissal, a copy of this article, and all exhibits which the chief administrative officer intends to submit in support of his prima facie case against the teacher including a list of witnesses to be called by the chief administrative officer, addresses and telephone numbers of the witnesses, and all pertinent documentation in the possession of the chief administrative officer relative to the circumstances surrounding the charges. Additional witnesses and exhibits in support of the chief administrative officer's prima facie case may not be added at a later date except on a showing of good cause. The notice and copy of the charges shall be sent by certified mail to said teacher at his address last known to the secretary of the board. The notice shall advise the teacher of his rights and the procedures under this section.

(3) If a teacher objects to the grounds given for the dismissal, such teacher may file with the chief administrative officer a written notice of objection and a request for a hearing. Such written notice shall be made within seven days of the receipt by the teacher of the notice of dismissal. If the teacher fails to file the written notice within said time, such failure shall be deemed to be a waiver of his right to a hearing and the dismissal shall be final, except that the board of education may grant a hearing upon a determination that the failure to file written notice for a hearing was due to good cause. If the teacher files a written notice of objection, such teacher shall continue to receive regular compensation from the time such teacher is suspended until a decision is rendered by the board pursuant to subsection (9) of this section, but in no event beyond one hundred twenty days.

(4) (a) If a hearing is requested by the teacher, it shall be conducted before an impartial hearing officer selected jointly by the teacher and the chief administrative officer. The hearing officer shall be selected no later than five days following the receipt by the chief administrative officer of the teacher's written notice of objection. If the teacher and the chief administrative officer fail to agree on the selection of a hearing officer, they shall request the chief judge of the judicial district in which the school district is located to select a list of three hearing officers. The list of hearing officers shall be given to the teacher and the chief administrative officer within five days of the request by the parties. Each party may strike one name from the list and shall notify the chief judge of the name to be stricken no later than three days following receipt of the list. The person whose name is not struck shall be the hearing officer; except that, if more than one name remains on the list because the parties struck the same name or because one or both parties failed to strike a name within the prescribed time period, the chief judge may choose the hearing officer from the remaining names.

(b) Hearing officers shall be impartial individuals with experience in the conducting of hearings and with experience in labor or employment matters.

(c) Expenses of the hearing officer shall be paid from funds of the school district.

(5) Within five days of his selection, the hearing officer shall give the teacher and the chief administrative officer at least fourteen days' written notice of the date for the hearing including the time and the place therefor, but in no event shall such hearing commence more than thirty days after the selection of the hearing officer.

(6) (a) Within ten days of the selection of the hearing officer, the teacher shall provide to the chief administrative officer a list of all exhibits to be presented at the hearing and all witnesses to be called, including the addresses and telephone numbers of the witnesses. Additional witnesses and exhibits may not be added at a later date except upon a showing of good cause.

(b) Neither party shall be allowed to take depositions of the other party's witnesses or to submit interrogatories to the other party. The affidavit of a witness may be introduced into evidence if such witness is unavailable at the time of the hearing.

(7) (a) Hearings held pursuant to this section shall be open to the public unless either the teacher or the chief administrative officer requests a private hearing before the hearing officer, but no findings of fact or recommendations shall be adopted by the hearing officer in any private hearing. The procedures for the conduct of the hearing shall be informal, and rules of evidence shall not be strictly applied except as necessitated in the opinion

(b) The hearing officer may receive or reject evidence and testimony, administer oaths, and, if necessary, subpoena witnesses.

(c) At any hearing, the teacher has the right to appear in person with or without counsel, to be heard and to present testimony of witnesses and all evidence bearing upon his proposed dismissal, and to cross-examine witnesses. By entering an appearance on behalf of the teacher or the chief administrative officer, counsel agrees to be prepared to commence the hearing within the time limitations of this section and to proceed expeditiously once the hearing has begun. All school district records pertaining to the teacher shall be made available for the use of the hearing officer or the teacher.

(d) An audiotaped record shall be made of the hearing, and, if the teacher files an action for review pursuant to the provisions of subsection (10) of this section, the teacher and the school district shall share equally in the cost of transcribing the record.

(e) Any hearing held pursuant to the provisions of this section shall be completed within ten days of its commencement, unless the parties otherwise agree, and neither party shall have more than five days to present its case in chief.

(8) The chief administrative officer shall have the burden of proving that his recommendation for the dismissal of the teacher was for the reasons given in the notice of dismissal and that the dismissal was made in accordance with the provisions of this article. Where unsatisfactory performance is a ground for dismissal, the chief administrative officer shall establish that the teacher had been evaluated pursuant to the written system to evaluate certificated personnel adopted by the school district pursuant to section 22-9-106. The hearing officer shall review the evidence and testimony and make written findings of fact thereon. The hearing officer shall make one of the two following recommendations: The teacher be dismissed or the teacher be retained. The findings of fact and the recommendation shall be adopted by the hearing officer in open session not later than twenty days after the conclusion of the hearing and shall be forwarded to said teacher and to the board.

(9) The board shall review the hearing officer's findings of fact and recommendation, and it shall enter its written order within twenty days after the date of the hearing officer's findings and recommendation. The board shall take one of the three following actions: The teacher be dismissed; the teacher be retained; or the teacher be placed on a one-year probation; but, if the board dismisses the teacher over the hearing officer's recommendation of retention, the board shall make a conclusion, giving its reasons therefor, which must be supported by the record, and such finding shall be included in its written order. The secretary of the board shall cause a copy of said order to be given immediately to the teacher and a copy to be entered into the teacher's local file.

(10) (a) If the board dismisses the teacher pursuant to the provisions of subsection (9) of this section, the teacher may file an action for review in the court of appeals in accordance with the provisions of this subsection (10), in which action the board shall be made the party defendant. Such action for review shall be heard in an expedited manner and shall be given precedence over all other civil cases, except cases arising under the "Workers' Compensation Act of Colorado", articles 40 to 47 of title 8, C.R.S., and cases arising under the "Colorado Employment Security Act", articles 70 to 82 of title 8, C.R.S.



(b) An action for review shall be commenced by the service of a c of the petition upon the board of the school district and filing the s with the court of appeals within twenty days after the written order of missal made by the board. The petition shall state the grounds upon w the review is sought. After the filing of the action for review in the c of appeals, such action shall be conducted in the manner prescribed by 3.1 of the Colorado appellate rules.

(c) The action for review shall be based upon the record before the h ing officer. If the decision of the board to dismiss the teacher was in acc ance with the recommendation of the hearing officer, the court of app shall review such record to determine whether the action of the board arbitrary or capricious or was legally impermissible. If the decision of board to dismiss the teacher was made over the hearing officer's rec mendation of retention, the court of appeals shall either affirm the deci of the board or affirm the recommendation of the hearing officer, b upon the court's review of the record as a whole and the court's own ju ment as to whether the board's decision or the hearing officer's recommer tion has more support in the record as a whole.

(d) In the action for review, if the court of appeals finds any irregula or error made during the hearing before the hearing officer, the court s remand the case for further hearing.

(e) Further appeal to the supreme court from a determination of the c of appeals may be made only upon a writ of certiorari issued in the discre of the supreme court.

(11) (a) The board of a school district may take immediate actio dismiss a teacher, without a hearing, notwithstanding subsections (2) to of this section, pending the final outcome of judicial review or when time for seeking review has elapsed, when the teacher is convicted, pl nolo contendere, or receives a deferred sentence for:

(I) A violation of any law of this state or any counterpart municipal of this state involving unlawful behavior pursuant to any of the follow statutory provisions: Sections 18-3-305, 18-6-302, and 18-6-701, C.R section 18-6-301, C.R.S., when the victim is a child who is ten years of or older and under eighteen years of age, and part 4 of article 3, pa of article 6, and part 4 of article 7 of title 18, C.R.S.; or

(II) A violation of any law of this state, any municipality of this st or the United States involving the illegal sale of controlled substances defined in section 12-22-303 (7), C.R.S.

(b) A certified copy of the judgment of a court of competent jurisdict of a conviction, the acceptance of a guilty plea, a plea of nolo contend or a deferred sentence shall be conclusive evidence for the purposes of subsection (11).

Source: L. 90: Entire article R & RE and IP(11)(a), (11)(a)(I), and (11 amended, pp. 1123, 1032, § § 1, 23, effective July 1.

cy. (See *Southern Cal. Jockey Club v. California Horse Racing Bd.* (1950) 36 Cal.2d 167, 174–178, 223 P.2d 1.) Courts are relatively ill-equipped to determine whether an individual would be qualified, for example, to practice a particular profession or trade. (See *Savelli v. Board of Medical Examiners* (1964) 229 Cal.App.2d 124, 129, 131–132, 40 Cal.Rptr. 171.) In a case involving the agency's initial determination whether an individual qualifies to enter a profession or trade the courts uphold the agency decision unless it lacks substantial evidentiary support or infringes upon the applicant's statutory or constitutional rights. Once the agency has initially exercised its expertise and determined that an individual fulfills the requirements to practice his profession, the agency's subsequent revocation of the license calls for an independent judgment review of the facts underlying any such administrative decision." (Fns. omitted.)

[2] By analogy to the *Bixby* language, an applicant for a teaching position does not possess a vested right to be hired, but a tenured teacher possessed a vested right to be retained. Between these two falls the instant case: one's right to be rehired following a trial period to determine competency and effectiveness prior to being granted tenure.

[3] In considering the student's need for education, the teacher's need for job security, and the school board's need for flexibility in evaluating and hiring employees who may remain 40 years, the Legislature may determine whether a teacher's vested right shall be granted, postponed or denied. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548.) Our school system is established not to provide jobs for teachers but rather to educate the young. Establishing a test period for teachers to prove themselves is essential to a good education system. While refusal to grant total job security at the time of initial hiring may be repugnant to those pursuing a teaching career, repeated statutory amendments relating to probationary teachers' rights (see Comment, *Probationary Teacher Dismissal* (1974) 21 UCLA L.Rev. 1257, 1260–1264), reveal that the Legislature has been well aware of the delicate balancing necessary to accommodate these sometimes competing interests.

Examination of existing statutes convinces us the Legislature has not seen fit to grant probationary teachers a vested right to be rehired so as to make trial de novo review applicable. By labelling the position probationary, the Legislature had clearly advised the employee that the position is neither vested nor permanent. Probation means the teacher is on trial—his competence and suitability remaining to be determined. (See Webster's New Internat. Dict. (3d ed. 1961) p. 1806.) Probationary is the opposite of vested. Although the label may not be determinative, it is strong indication of legislative intent not to grant a vested right.

To hold that a probationary teacher has a vested right to be rehired for the next school year—requiring limited trial de novo review—would contravene portions of section 13443, subdivisions (c) and (d). By providing that the school board's determination of the sufficiency of the cause is conclusive, the Legislature has foreclosed judicial evaluation of the gravity of misconduct of probationary teachers. Under subdivisions (c) and (d), once misconduct relating to the schools and its pupils is established, it is within the school board's discretion to determine whether the cause is sufficiently serious to warrant a refusal to rehire and whether the teacher's other qualities justify reemployment. (*Lindros v. Governing Bd. of the Torrance Unified School Dist., supra*, 9 Cal.3d 524, 534, 108 Cal.Rptr. 185, 510 P.2d 361, *Bekiaris v. Board of Education, supra*, 6 Cal.3d 575, 586–587, 100 Cal.Rptr. 16, 493 P.2d 480; *Griggs v. Board of Trustees, supra*, 61 Cal.2d 93, 96, 37 Cal.Rptr. 194, 389 P.2d 722; *McGlone v. Mt. Diablo Unified Sch. Dist.* (1969) 3 Cal.App.3d 17, 22, 82 Cal.Rptr. 225; *American Federation of Teachers v. San Lorenzo etc. Sch. Dist.* (1969)

# NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE



CONTRA COSTA COMMUNITY COLLEGES RETIREES ASSOCIATION, etc., et al.,

Plaintiffs and Respondents,

v.

GOVERNING BOARD OF THE CONTRA COSTA COMMUNITY COLLEGE DISTRICT et al.,

Defendants and Appellants.

A064817

(Contra Costa County Super. Ct. No. 302815)

Appellants Contra Costa Community College District (the district) and its Governing Board (the board) appeal a judgment granting a peremptory writ of mandate ordering them to provide certain health benefits to members of the Contra Costa Community Colleges Retirees Association (the association). They contend that board policy does not require them to do so and, alternatively, that a memorandum of understanding (MOU) supersedes any previous policy. They also contend such payments would violate the constitutional proscription against municipal indebtedness (Cal. Const., art. XVI, § 18), and that the doctrine of laches precludes such relief. We affirm.

FACTS

On June 14, 1972, the board approved payment by the district of health and dental plan premiums (collectively, health premiums or health insurance) for retired employees and their dependents who were enrolled in the district's group plans at the time of the employee's retirement. District coverage was applicable to certificated and classified employees whose retirement date was effective June 30, 1972, or after.

On July 1, 1973, Board Policy (BP) 8321 was enacted. It states:

"DISTRICT PAID-GROUP INSURANCE PLANS

"The district shall pay the premium of employees in three employee benefit plans: health plan, dental plan and salary continuance plan.

"Employees may extend coverage under the dental and health plans to dependent family members with premiums to be paid by the district.

"Employees who retire with 10 or more years of service to the district may continue employee and dependent family coverage in the health and dental plans, subject to the rules and regulations of the contracts with the health and dental plan organizations. A 'retired' employee shall be defined as one who has retired for service or disability and who is eligible or is receiving a retirement allowance from the State Teachers Retirement System or the Public Employees Retirement System."

BP 8341, issued in 1977, reiterated that retiree insurance coverage would be "district-paid." A companion administrative procedure covering retiree health plans was entitled "District-Paid Health and Dental Plan Premiums for Retirees." Despite annual

increases in the cost of the premiums, the district continued to pay the premiums for qualified retirees and their dependents until 1984.

On September 15, 1983, Public Employees Union, Local 1, representing classified employees, entered into an MOU with the district changing the eligibility requirements for retiree health insurance. Prior to July 1, 1983, an employee was eligible for such insurance upon reaching age 50 and with a minimum of 10 years of service. The MOU increased the minimum age and years of service. It also reduced the district contribution toward dependent health insurance premiums to 50%. United Faculty, representing academic employees, agreed to the same changes. The result of the changes was to deprive some employees who had not yet retired of retirement benefits to which they would have been entitled under the 1972 policy. For example, Alice Johnson, who began employment in 1973 and retired in 1989, became ineligible for retiree health care benefits despite being over 50 years of age and having 16 years of service.

On behalf of a class consisting of all retirees with 10 years of service, hired prior to July 1, 1977, and retired between July 1, 1984, and December 31, 1990, the association and 10 individually named retirees petitioned for a writ of mandate to compel the district to restore to the class the retirement health benefits in effect between June 30, 1972, and July 1, 1982, plus any losses suffered as a result of board and/or district actions.

The trial court certified the class and ordered a peremptory writ to issue commanding the board and district to:

1. Compensate class members for an amount equal to all premium contributions they paid on their own behalf or that of their eligible dependents for retirement health benefits, plus interest.

2. Cease giving force and effect to any board action placing a limit or cap on the district's contributions to health premiums paid on behalf of the class or restricting the class members' eligibility for said benefit program beyond the eligibility restrictions of BP 8321 [of July 1, 1973; see p. 2, *ante*].

3. Begin immediate payment of the full cost of all health premiums for all eligible retirees and their dependents as defined in BP 8321.

4. Change any district records to reflect the eligibility for retirement benefits of the class members.

5. Reinstate to a district-provided plan any eligible class member or spouse who was dropped from coverage if eligible under BP 8321.

6. Bear the costs of notification of eligibility and reinstatement.

7. Notify each class member of the amount of reimbursement due.

8. Take no action henceforth to limit, cap, or reduce the district's payment of health insurance premiums to class members.

## DISCUSSION

### I

Appellants contend the court improperly interpreted BP 8321 as providing fully-paid lifetime retirement health benefits to eligible retirees and their dependents. The trial

court ruled that the policy unambiguously provided such benefits and, alternatively, that extrinsic evidence supported such a finding.

The interpretation of a regulation or local enactment, like the interpretation of a statute, is a question of law, and its ultimate resolution rests with the courts. (*Carmona* v. *Division of Industrial Safety* (1975) 13 Cal.3d 303, 310.) It is axiomatic that where the language of an enactment is clear, its plain meaning should be followed. (*Great Lakes Properties, Inc.* v. *City of El Segundo* (1977) 19 Cal.3d 152, 155.) BP 8321 states in unambiguous language under a caption entitled "*District Paid-Group Insurance Plans*" that the district "*shall pay*" the health and dental plan premiums of its employees, and that retired employees who meet specified criteria "*may continue*" membership coverage in the plans. There is a complete absence of limiting language, e.g., language addressing or even referring to employee reimbursement, duration of benefits, or the consequences of increases by the health plan organizations. We conclude the meaning of BP 8321 is clear and straightforward: the district followed Government Code section 53205.2[1] and exercised its discretion to afford benefits that did not terminate upon retirement, and obligated itself to pay the health plan premiums of qualified retirees subject only to the conditions imposed by the contract between the district and the health plan organizations. That the district thought this to be the case is clear from the fact that it continued to pay the health care premiums for its retired employees and their dependents for several years.

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1 Unless otherwise indicated, all further statutory references are to the Government Code.

Neither *Orange County Employees Assn.* v. *County of Orange* (1991) 234 Cal.App.3d 833 nor *Ventura County Retired Employees' Assn.* v. *County of Ventura* (1991) 228 Cal.App.3d 1594 — upon which we invited supplemental briefing — contradict the conclusion we reach here. The issue in those cases was whether the county employers had a *statutory* duty under section 53205.2 to provide equal health care benefits at equal rates for both active and retired employees. In the instant case we are resolving a *contractual* right to receive benefits. We do not hold that respondents have a right to any specific health care plan, since the district can only provide health coverage that is currently available to it in the market at a reasonable cost. We decide only that the limited class of retirees involved in this case is entitled to the payment of premiums by the district for the same coverage provided for the district's active employees.

II

Appellants' primary contention is that "retiree health benefits for California public school employees should not be deemed to vest such that they cannot be modified by collective bargaining prior to retirement." Respondents rejoin that "retirement health benefits are deferred compensation which vests prior to retirement," and that "the unions could not waive [respondents'] constitutional or vested contract rights."

"'[T]he prohibition [against impairment of contracts] is not an absolute one and is not to be read with literal exactness like a mathematical formula.' [Citation.] Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the

Constitution." (*United States Trust Co.* v. *New Jersey* (1977) 431 U.S. 1, 21 [*U.S. Trust Co.*]; *Allen* v. *Board of Administration* (1983) 34 Cal.3d 114, 119 [*Allen*].)

"[P]ublic employment gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to payment of salary which has been earned." (*Kern* v. *City of Long Beach* (1947) 29 Cal.2d 848, 852-853.) Public employees have vested contractual rights to payment of certain benefits which accrue from the date of employment, even though the payments themselves are deferred and dependent upon certain contingencies, and the employing agency may not deny or impair the contingent liability any more than it can refuse to make the salary payments which are immediately due. (*Id.* at p. 855; see also *Betts* v. *Board of Administration* (1978) 21 Cal.3d 859, 863.) *Kern* did not specify whether the federal (U.S. Const., art I, § 10) or the state (Cal. Const., art. I, § 9) Constitution affords this protection, but subsequent decisions of our Supreme Court assume both clauses protect these rights. (*Legislature* v. *Eu* (1991) 54 Cal.3d 492, 528.)

Although these principles have been applied most frequently to pension rights (see *Legislature* v. *Eu, supra,* 54 Cal.3d at p. 528 and cases cited therein), they have also been applied to other forms of future benefits. In *Olson* v. *Cory* (1980) 27 Cal.3d 532, for example, a statute limiting the annual cost-of-living increases provided for judicial salaries was declared unconstitutional as to those judges sitting or retired before the effective date of the statute. In *California League of City Employee Associations* v. *Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135 [*California League*], a library district was

ordered to reinstate the right to longevity salary increases, additional vacation and sabbaticals to employees hired before these benefits were eliminated by resolution. In *Thorning* v. *Hollister School Dist.* (1992) 11 Cal.App.4th 1598, a school board was ordered to continue paying the health benefits it had authorized for 10 years for sitting board members, to board members who retired prior to the expiration of the 10-year authorization. As *California League, supra*, 87 Cal.3d at p. 140 said of the benefits at issue therein, payment of retirement health insurance premiums are "important to the employees, [are] an inducement to remaining employed with the district, and [are] a form of compensation which [is] earned by remain[ing] in employment."

Appellants claim there is no unconstitutional impairment of contract if a vested benefit right is modified by an MOU or collective bargaining agreement. It is a basic principle of the collective bargaining system that members of a bargaining unit are bound by the terms of a valid collective bargaining agreement, even if they are not formally parties thereto and may not be members of the organization negotiating the agreement. (*San Lorenzo Education Assn.* v. *Wilson* (1982) 32 Cal.3d 841, 846.) However, a collective bargaining agreement may not contain a provision abrogating employees' fundamental constitutional rights. (*Phillips* v. *State Personnel Bd.* (1986) 184 Cal.App.3d 651, 660; *International Assn. of Fire Fighters* v. *City of San Leandro* (1986) 181 Cal.App.3d 179, 183.)

"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." (*Bixby* v. *Pierno* (1971) 4 Cal.3d 130, 144.) At this time in our history it is difficult to imagine a right which is more important to retired persons in their life situations than the availability and cost of health care. The post-retirement continuation of their paid health plans is, "in human terms" and "importance" (*id.*) fundamental by any standard.

III

Appellants contend that the meet and confer process (also referred to in this opinion as collective bargaining) will be frustrated if benefits created thereby cannot be modified in the same fashion.

The purpose of the Educational Employment Relations Act (EERA) (§§ 3540-3549.1) is "to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy." (§ 3540.) The scope of representation is limited to wages, hours, and other terms and conditions of employment. (§ 3543.2.) Terms and conditions of employment include "any health and welfare benefits for the benefit of [the school system's] officers, employees, retired employees . . . " (§§ 3543.2, subd. (a), 53200 and 53201.)

Respondents do not dispute that retiree health benefits are a proper, if not mandatory, subject of the meet and confer process. Furthermore, as respondents correctly point out, nothing prevents the district and the unions from agreeing that their collective bargaining agreement shall specifically state that it does not create vested rights in such conditions of employment as retiree health care or vacation accrual. The benefits at issue here, however, were not created through meet and confer sessions. They were created by a district policy enacted prior to the advent of union representation and the meet and confer process, which established a vested right in qualified employees to receive retiree health benefits. Requiring the district to honor its obligation under that policy does not inhibit collective bargaining over retiree health benefits. The very fact that the persons affected by this action are limited to retirees hired before July 1, 1977, the date the first collective bargaining agreement between the parties took effect, is evidence of collective bargaining's flexible nature. Respondents have not asserted that employees hired post-collective bargaining have the same vested retiree health benefit rights as they do.

IV

Appellants also contend there was no impairment of contract in their modification of retiree health benefits.

Assuming the retirement health benefits granted by the 1973 board resolution (BP 8321) are vested, the question becomes whether the changes thereto, effective July 1, 1984, are within the scope of "comparable new advantages." (*Allen, supra*, 45 Cal.2d at p. 131.)

"An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. [Citations.] Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." (*Ibid.*) Furthermore, "it is by advantage or disadvantage to the individual employees whose already earned and vested pension rights are involved that the validity of attempted changes in those rights depends, and benefits subsequently obtained by other employees cannot operate to offset detriments imposed on those whose pension rights have heretofore accrued." (*Abbott* v. *City of Los Angeles* (1958) 50 Cal.2d 438, 453.)

The collective bargaining agreement entered into between the district and classified employees (non-academic) on September 15, 1993, effective July 1, 1984, provides that in exchange for the changes in retiree health insurance provisions, the district will pay the equivalent of full Kaiser health plan coverage for active employees and their dependents. Employees who select one of the available health plans other than Kaiser must pay the difference if the plan's premium is more expensive than Kaiser's. The agreement also states that in exchange for the changes to retiree health insurance,

(1) active employees will receive two additional holidays for fiscal years 1983-84 and 1984-85, (2) the district will increase its contribution to a group tax deferred annuity program from $45.55 to $52.38, and (3) if the State restores certain revenues to the district, the classified employees may "reopen the contract." In opposition to respondents' mandamus petition, David Platt, the classified employees' chief negotiator between 1983 and 1991, declared that his union agreed to the changes in retiree health insurance because such benefits were consuming an ever increasing portion of the district's budget, and the district was anticipating a reduction in state funding in 1983-84. Although the state funding was not reduced as anticipated, his union and the district agreed the state funds would go toward 1984-85 salary increases in exchange for the retiree health insurance changes. The salaries of classified employees were increased 10.4%, effective July 1, 1984, and the union has since been "unwilling to sacrifice current salary increases" for the retiree health benefits.

The agreement of February 1984 between the district and certificated employees (academic) does not contain the kind of specific language appearing in the classified employees' agreement regarding changes in retiree health benefits. However, Leslie Birdsall and Brendan Brown, negotiators for the certificated employees, declared in opposition to respondents' petition that their union also agreed to the changes in exchange for salary increases in 1984-85 and subsequent years. The salary of certificated employees was increased 8.4% effective July 1, 1984, with an additional 4% increase

effective January 1, 1985. The certificated employees also agreed to the change out of concern that future retirees were in danger of losing health benefits entirely.

The changes in eligibility for retiree health benefits and the reduction in the amount of the district's payment toward such benefits is a patent decrease in retirement benefits. Retirees may have to pay more for their own health insurance and must pay more for their dependents' insurance. Even more disadvantageous than the increased cost of their health insurance is the possible elimination of the benefit entirely. For example, under the 1973 board policy a classified employee who commenced work in February 1977 at age 40 would qualify for full retiree health insurance benefits for self and dependents in February 1987: ten years of service to the district and a minimum PERS retirement age of 50. However, under the agreement effective July 1, 1984, to retire in February 1987 and receive even the reduced retiree health insurance benefits (100% Kaiser for self, 50% Kaiser for dependents), a classified employee had to be 55 years old and have worked 13 years for the district.[2]

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[2] In pertinent part, the agreement states:

"1.1 Eligibility

| Fiscal Year | Minimum Age | Minimum Years of Service |
|---|---|---|
| 1983-84 | 50 | 10 |
| | (Provided retirement is submitted by January 1, 1984, to become effective no later than June 30, 1984) | |
| 1983-84 | 55 | 10 |
| 1984-85 | 55 | 11 |
| 1985-86 | 55 | 12 |
| 1986-87 | 55 | 13 |
| 1987-88 | 55 | 14 |
| 1988-89 | 55 | 15 |
| 1989-90 | 55 | See Below |

1989-1990 and thereafter, where the minimum age at the date of retirement is 55 or more, and where the years of service when added together equals a minimum of 80 (55 + 25, 56 + 24, 57 + 23, 65 + 15, 70 + 10, etc.)."

Salary increases and a few extra vacation days for all current employees in exchange for reducing, not to mention the possibly of eliminating, the vested health benefits of a percentage of those employees do not constitute a commensurate advantage to those who have been disadvantaged. nor do they bear a material relation to the theory of a retirement system and its successful operation. The purpose of a retirement system is to provide a reasonable degree of financial security to retirees and their dependents for the duration of a retiree's life. (*Hittle* v. *Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 390.) A reduction of retiree health benefits reduces both the quantity and quality of such financial security. At most, the affected persons received six years of salary increases (i.e., those who retired in December 1990) and 12 additional vacation days in lieu of the retiree health benefits outlined in the 1973 district policy. Those who retired prior to December 1990 received fewer years of salary increase and vacation, some as few as one year and two days. Even six years of salary increase and 12 extra vacation days are not comparable to a lifetime of paid health insurance for the retired employee and his or her dependents.

Finally, reduced financial circumstances alone are not sufficient "changing conditions" (see *Allen, supra*, 45 Cal.2d at p. 131) to permit modification of a public entity's contractual obligations. "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." (*U.S.*

*Trust Co., supra,* 431 U.S. at p. 26.) "[A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." (*Id.* at p. 29; *Sonoma County Organization of Public Employees* v. *County of Sonoma* (1979) 23 Cal.3d 296, 308 [*Sonoma County*]; *United Firefighters of Los Angeles City* v. *City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1110 [*United Firefighters*].) "[A court] can only sustain [an impairment] if that impairment [is] both reasonable and necessary to serve the . . . important purposes claimed by the state." (*U.S. Trust Co., supra,* 431 U.S. at p. 29; *United Firefighters, supra,* at p. 1110.) "Necessity" requires an evaluation of whether a less drastic modification of the contractual obligation or other steps which entailed no modification would have permitted the public entity to meet its claimed important goals. Furthermore, a change of circumstances will not justify a substantial impairment unless it was unforeseen and unforeseeable. (*U.S. Trust Co., supra,* at pp. 30-31; *United Firefighters, supra,* at pp. 1110-1111.)

Although salary increases are important to the retention and morale of a public entity's employees, they are not of such urgency as to warrant impairing a vested contractual obligation. The district originally anticipated a reduction of state funding, but the reduction did not occur. Thus, it was not lacking the money to fund retiree health benefits. It simply chose to allocate its resources elsewhere. It was not even a choice between competing contractual obligations, because the district had not, prior to 1983, promised salary increases in 1984.

Furthermore, the financial difficulties the district was encountering in 1983 were foreseeable. In 1973 when it enacted its retiree health benefit policy, it considered life expectancies and retirement age data of certificated, but not classified, employees. It did not create a separate fund for retiree health benefits, but funded them out of its general fund.. As of the mid-1970's it was aware of substantial increases in Blue Cross premiums, so it could reasonably predict an escalation of all health insurance premiums. "[A] contract may not be impaired because of a crisis created by the state's voluntary conduct." (*Sonoma County*, *supra*, 23 Cal.3d at p. 313.) It is also self-evident that the number of persons in the vested category will gradually diminish and eventually extinguish.

V

The district contends the change in retiree health benefits was an unfair practice which the respondents were obligated to present first to the Public Employment Relations Board (PERB). Section 3541.5 provides that the "initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter ['Meeting and Negotiating in Public Education Employment;' § 3540 et seq.] shall be a matter within the exclusive jurisdiction of the board." However, PERB does not have authority to enforce agreements between the parties, i.e., employee, employee organization or employer. (§ 3541.5, subd. (b).) By their action respondents sought enforcement of the 1973 board enactment, BP 8321, which was enacted prior to the advent of collective bargaining in public schools and which respondents contend

created a contract between the district and all employees hired prior to July 1, 1977. Even if we were to agree that BP 8321 did not create a fundamental vested right to district-paid retirement health insurance premiums or that the unions representing respondents' bargaining units were authorized to enter into an agreement reducing the retirement benefits of the policy, we agree that at the least the policy created a contract between the district and respondents. Therefore, respondents did not first have to seek enforcement thereof from PERB.

The district's reliance on *Los Angeles Council of School Nurses* v. *Los Angeles Unified School Dist.* (1980) 113 Cal.App.3d 666 is misplaced. In *School Nurses* a group of non-teaching employees represented by the teachers' union complained that the union breached its duty of fair representation by agreeing to certain hours of employment for the non-teachers. *School Nurses* concluded that the non-teachers' complaint raised a question of an unfair practice on the part of the union, and therefore the non-teachers had to seek redress first from PERB. It specifically noted that while PERB has no authority to enforce a collective bargaining agreement, the matter did not concern such enforcement but whether the agreement's provisions constituted unfair practices by the union and school district. (*Id.* at p. 672.) Respondents here are not making any claim of unfair practices on the part of the district or their representative unions concerning the collective bargaining agreements that took effect July 1, 1984.

VI

Appellants argue that granting respondents the relief sought violates California Constitution, article XVI, section 18 which provides, in pertinent part, that no school district "shall incur any indebtedness or liability . . . exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof . . . ." Historically, this clause has been interpreted as meaning that "no indebtedness or liability incurred in one year shall be paid out of the income or revenue of any future year" (*McBean* v. *City of Fresno* (1896) 112 Cal. 159, 164), thereby preventing parties with contractual money claims against a municipality for goods or services rendered in a given year from collecting if the government did not have sufficient revenue in the same year to pay the claim. (See *Compton Community College etc. Teachers* v. *Compton Community College Dist.* (1985) 165 Cal.App.3d 82, 89.)

However, "An obligation imposed by law upon a [school district] is not an indebtedness or liability within the meaning of the debt limitation [clause]." (*County of Los Angeles* v. *Byram* (1951) 36 Cal.2d 694, 698.) Not only does the California Constitution make education one of the highest priorities of state and local government (art. IX, §§ 1 and 5; art. XVI, § 8), until 1988, i.e., during the years pertinent to this case, state law required community college districts to employ all personnel not inconsistent with minimum standards set by the community college board of governors, and establish salaries and benefits for district employees not inconsistent with state statutes. (Former Ed. Code, § 72290). Districts were also obligated to "fix and order paid" the

compensation of their certificated and classified employees. (Former Ed. Code, §§ 87801-88160.) As already discussed, compensation encompasses more than salary or wages. (See part II, *ante*.)

Furthermore, it has long been held, for purposes of the debt limitation clause, that in the case of multi-year installment contracts, "no debt or liability is created for the aggregate amount of the installments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed." (*McBean* v. *City of Fresno*, *supra*, 112 Cal. at p. 167.) "A sum payable upon a contingency [] is not a debt, or does not become a debt until the contingency has happened." (*Id.* at p. 168, quoting *People* v. *Arguello* (1869) 37 Cal. 524, 525.) Here, the district's obligation to make the health insurance premium payments occurred only if the employee met the age and service requirements and as long as the employee remained alive. The aggregate amount due all retired employees would never be payable in a single year. There was evidence that the district had an uncommitted balance in its general fund at the end of each fiscal year, and retiree health insurance premiums were less than one percent of the district's annual budget.

VII

Finally, appellants contend the doctrine of laches precludes the class members from asserting their claims. "[T]he affirmative defense of laches requires unreasonable delay in bringing suit plus either [acquiescence] in the act about which [respondents] complains or prejudice to the [appellants] resulting from the delay. Prejudice is never

presumed: rather it must be affirmatively demonstrated by the [appellants] in order to sustain [their] burdens of proof and the production of evidence on the issue. Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances, and in the absence of manifest injustice or a lack of substantial support in the evidence its determination will be sustained." (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624, citations and internal quotations omitted.)

Substantial evidence supports the trial court's finding that there was no unreasonable delay by the class members, nor did they acquiesce in the action of the board and district. The action was commenced in June 1987, less than three years after the earliest date any member of the class could have been aggrieved. There were informal efforts to resolve the dispute before filing the action, and appellants made requests to delay aspects of the litigation. Contrary to appellants' assertion that the class members acquiesced in the changes to retiree health care benefits because they accepted salary increases, there was no evidence that the class members were aware of any connection between retirement benefits and salary increases, and the district continued to grant salary increases even after learning of the class members' grievances.

## CONCLUSION

We conclude that the trial court correctly determined that the retiree health benefits at issue herein were vested, and could not be eliminated by the collective bargaining agreement upon which appellants rely. The affected employees and their dependents are

entitled, at district expense, to the same health care benefits provided for active employees.

## DISPOSITION

The judgment is affirmed.

HANING, J.

We concur.

PETERSON, P.J.

KING, J.