ATTACHMENT A

THE PROPOSED DECISION
BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Appeal Regarding the Temporary Transit Employee Exemption of the Public Employees' Pension Reform Act of 2013 by:

SANTA CLARA VALLEY TRANSIT AUTHORITY,

Respondent,

and

LA KEYSHA DORSEY, JESSE GOMES, AARON GWIN, LLOYD JACKSON II, TONI O'CONNOR, BUDDY ROARK,

Respondents,

and

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,

Respondent,

and

STATE OF CALIFORNIA,

Respondent.
PROPOSED DECISION

Administrative Law Judge Melissa G. Crowe, State of California, Office of Administrative Hearings, heard this matter on December 17 and 18, 2018, in Oakland, California.

Senior Attorney Kevin Kreutz represented complainant Renee Ostrander, Chief of the Employer Account Management Division, California Public Employees’ Retirement System (complainant).

Evelynn Tran, General Counsel, and Richard North, Senior Assistant Counsel, represented respondent Santa Clara Valley Transportation Authority (VTA).

Peter Saltzman, Kate Hallward, and Julia Lum, Attorneys at Law, Leonard Carder, LLP, represented respondents La Keysha Dorsey, Jesse Gomes, Aaron Gwin, Lloyd Jackson II, Toni O’Connor, and Buddy Roark (transit employees).

There has been no appearance by respondent San Francisco Bay Area Rapid Transit District.

Although named in the caption of the Statement of Issues, the State of California is no longer a party in this proceeding.

The record was left open for submission of written closing arguments, and for VTA to submit a complete copy of its notice of appeal (VTA 1). At the parties’ request and by order dated February 21, 2019, the time for filing briefs was extended to March 29, 2019. VTA’s closing brief was marked for identification as Joint Exhibit 127; transit employees’ closing brief was marked for identification as Joint Exhibit 128; complainant’s closing brief was marked for identification as Joint Exhibit 129; all respondents filed a joint reply brief, which was marked for identification as Joint Exhibit 130. The record closed and the matter was submitted for decision on March 29, 2019.

FACTUAL FINDINGS

Background

1. The California Public Employees’ Pension Reform Act of 2013 (PEPRA, Gov. Code, § 7522 et seq.) established a new retirement plan for most public employees hired on

1 The caption of the Statement of Issues erroneously refers to this agency as the Santa Clara Valley Transit Authority.

2 By order dated November 15, 2018, the State of California was dismissed as an improper party in this administrative proceeding.
The benefits provided to such “new employees” are less favorable than those provided to “classic employees” of the California Public Employees’ Retirement System (CalPERS), that is, employees who became members of CalPERS before January 1, 2013. Among other things, PEPRA increased the age at which employees could claim equivalent pension benefits, set a cap on the total compensation on which pension benefits could be based, required employees to pay one-half of the cost of funding their pension, and required the annual compensation used to calculate pension benefits to be determined by an average over a three-year period rather than a one-year period. (§§ 7522.02, subd. (b); 7522.10, subds. (c) & (g); 7522.20, subd. (a); 7522.30, subd. (a); 7522.32, subd. (a).)

After PEPRA took effect, the Secretary of Labor for the United States Department of Labor (DOL) informed California transit agencies that DOL had determined that PEPRA impermissibly impaired labor protections guaranteed to public transit employees under section 13(c) of the Urban Mass Transit Act (UMTA), and threatened to withhold certification of over $1 billion in transportation grants across the state. With respect to two grant applications the DOL issued formal letters denying certification based on its finding that the effects of PEPRA prevented the transit agencies from being able to comply with the requirements of section 13(c) of UMTA.

In response to the potential loss of federal transit dollars, on October 4, 2013, the California Legislature enacted Assembly Bill No. 1222 as urgency legislation. Assembly Bill No. 1222 added to PEPRA section 7522.02, subdivision (a)(3) (hereafter section 7522.02(a)(3)), which pertained exclusively to transit employees with collective bargaining rights protected under section 13(c) of UMTA. (Stats. 2013, ch. 527, § 1.) As enacted, section 7522.02(a)(3) created a transit employee exemption to PEPRA as follows:

(A) Notwithstanding paragraph (1), this article shall not apply to a public employee whose interests are protected under Section 5333(b) of Title 49 of the United States Code until a federal district court rules that the United States Secretary of Labor, or his or her designee, erred in determining that the application of this article precludes certification under that section, or until January 1, 2015, whichever is sooner.

(B) If a federal district court upholds the determination of the United States Secretary of Labor, or his or her designee, that

3 All subsequent statutory references are to the Government Code unless otherwise indicated.

4 UMTA is codified at United States Code, title 49, section 5333(b).

5 Not all of transit employees that are CalPERS members have collective bargaining protection under section 13(c) of UMTA. This case pertains only to transit employees who have such protection and are subject to the transit employee exemption.
application of this article precludes him or her from providing a certification under Section 5333(b) of Title 49 of the United States Code, this article shall not apply to a public employee specified in subparagraph (A).

On September 28, 2014, the California Legislature enacted Assembly Bill No. 1783, again as urgency legislation. This bill amended section 7522.02(a)(3)(A), to extend the sunset date of the transit employee exemption to January 1, 2016. (Stats. 2014, Chap. 724, § 1.)

4. At the same time of the passage of Assembly Bill No. 1222, the State of California and Sacramento Regional Transit (hereafter jointly referred to as California) brought an action for declaratory and injunctive relief against DOL in federal district court challenging the determination made by DOL in the formal letters referenced in Finding 2. (State of California v. United States Department of Labor (E.D. Cal. 2014) 76 F.Supp.3d 1125 (State of California I).) On December 30, 2014, the district court granted summary judgment in favor of California, and remanded the case to DOL for further proceedings consistent with its opinion. (Id., at p. 1148.)

5. Based on the federal court ruling, on February 25, 2015, CalPERS issued a Circular Letter (No. 200-006-15) advising all transit agencies that the transit employee exemption from PEPRA ended on December 30, 2014. In its Circular Letter, CalPERS advised transit agencies that transit employees hired between January 1, 2013 and December 30, 2014, would retain the classic retirement benefits earned during that period, but would begin to accrue reduced PEPRA benefits starting December 30, 2014.

6. On April 20, 2015, CalPERS notified transit employees of its determination that effective December 30, 2014, they would be subject to PEPRA. The letter advised:

What this means to you as a CalPERS member is that your CalPERS membership as a transit worker starting on or after January 1, 2013 through December 29, 2014 will retain your agency’s classic retirement benefits. Effective December 30, 2014, CalPERS has determined that you are subject to the PEPRA retirement benefit formula. CalPERS has created a new member appointment in our system, placing you in the PEPRA miscellaneous 2% at age 62 retirement benefit formula. This change in benefit formula may impact the percentage of member contributions you are required to pay.

7. In response to CalPERS’s decision to apply PEPRA to transit employees, on January 7, 2016, Assemblymember Mark Stone introduced Assembly Bill No. 1640. (Assem. Bill No. 1640 (2015-2016 Reg. Sess.).) This bill, sponsored by VTA, sought to amend section 7522.02(a)(3) to grant a permanent exemption from PEPRA for transit employees hired before December 30, 2014.
As summarized by the Legislative Counsel in its digest to Assembly Bill No. 1640:

This bill would extend indefinitely that exemption for those public employees, whose collective bargaining rights are subject to provisions of federal law and who became a member of a state or local public retirement system prior to December 30, 2014.

Assembly Bill No. 1640 passed in the Assembly and was referred to the Senate, where it died in the fall of 2016. (Cal. Legis. Info., Assem. Bill No. 1640 (2015-2016 Reg. Sess.).) ^

8. After numerous administrative appeals were filed with CalPERS regarding its decision to apply PEPRA to transit employees, on June 20, 2016, CalPERS filed a declaratory relief action in the Superior Court of California, seeking a judicial determination supporting its interpretation of section 7522.02(a)(3).

On review, the Court of Appeal held that CalPERS could not seek to enforce its interpretation of section 7522.02(a)(3) through the courts before giving affected parties the opportunity of an administrative appeal to the Board of Administration of CalPERS (Board) through its administrative hearing process. (Public Employees' Retirement System v. Santa Clara Valley Transportation Authority (2018) 23 Cal.App.5th 1040, 1047-1048.)

The federal court decisions

9. As set forth above, simultaneously with the passage of the transit employee exemption, California brought an action for declaratory and injunctive relief against the DOL in federal district court challenging DOL's administrative decisions which concluded that the application of PEPRA to transit employees precluded certification under section 13(c) of UMTA.


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^ Kurt Evans, a former Governmental Affairs Manager of VTA, testified at hearing to offer his explanation of why Assembly Bill No. 1640 was not enacted into law. According to Evans, the bill was dropped in the Senate because the governor's office had let it be known to the authors and sponsors of the bill that it would be vetoed if passed. The proffered reason for the veto was not the merits of the bill but the ongoing litigation in the CalPERS declaratory relief action, referenced in Finding 8.

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^ The Eastern District of California case number is Civ. No. 2:13-CV-20169.

In its amended complaint, California raised four claims against DOL: (1) DOL’s interpretation of PEPRA and section 13(c) was arbitrary and capricious in violation of the federal Administrative Procedure Act (5 U.S.C. § 500 et. seq.); (2) DOL acted in excess of its jurisdiction in denying section 13(c) certification; (3) DOL’s action violated the Spending Clause and California’s fiscal sovereignty under the Tenth Amendment; and (4) DOL prejudged the case and denied California due process of law in violation of the federal Administrative Procedure Act.

In State of California I, the district court considered a motion for summary judgment by California, and motions for summary judgment and to dismiss by DOL. The court identified several aspects of DOL’s decision that violated the federal Administrative Procedure Act, granted California’s motion for summary judgment on its claims arising under the federal Administrative Procedure Act, and remanded the case to DOL for further administrative proceedings consistent with its order. (State of California I, supra, 76 F.Supp.3d at p. 1148.) As stated by the district court in State of California II, in so ruling it had not instructed DOL to reach any particular result on remand. (State of California II, supra, 155 F.Supp.3d at p. 1095.) With respect to DOL’s motions, the Court granted DOL’s motion to dismiss the Spending Clause claim, with leave to amend, and denied DOL’s motion for summary judgment. DOL filed an appeal from State of California I, but that appeal was later dismissed. (State of California II, supra, at 155 F.Supp.3d at p. 1095.)

Following the remand, DOL issued a second decision reaching the same conclusion, namely that California’s grant applications could not be certified under section 13(c). (State of California II, supra, 155 F.Supp.3d at p. 1095.) In State of California II, the court considered whether DOL had followed its order in the post-remand proceedings. The court concluded that DOL’s post-remand decision was not inconsistent with its prior ruling except in one aspect which did not require a further remand. In the unpublished decision filed August 22, 2016, the court considered a motion for summary judgment by California, and DOL’s motions to dismiss or for summary judgment. These motions were resolved “largely in the State’s favor.” (State of California IV, supra, 306 F.Supp.3d at p. 1181.) Finally, in State of California IV, the court considered one last remaining question regarding the DOL decision, which it resolved on summary judgment in favor of California. (Id., at pp. 1189-1190.)

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8 The Ninth Circuit Court of Appeals case number is No. 18-155098.
The implementation of the transit employee exemption by CalPERS

10. Complainant Renee Ostrander is the Division Chief of the Employer Account Management Division (EAMD) of CalPERS. She has held this position since August 2012. Before being appointed Division Chief, complainant served for seven years as the Assistant Chief of the Customer Account Services Division (CASD). Both CASD and EAMD fall under the Customer Services and Support Division of CalPERS. When complainant was in CASD, it serviced the functions that are now within EAMD. Complainant also oversaw other member services functions in CASD, such as calculating service credit, as well as health and contract functions.

11. EAMD is the division of CalPERS that is the primary contact for employers. EAMD oversees enrollment of new members by employers through the “MyCalPERS” system. While EAMD is not involved in the calculation of retirement benefits, it is the section that collects the data from employers utilized by CalPERS when calculating final compensation and retirement benefits, such as membership status, service credit, and payroll. Within EAMD is the Membership Management Section, which handles membership issues, such as determining correct enrollment date and proper benefit levels.

12. EAMD was involved in the implementation of the transit employee exemption at CalPERS. EAMD was responsible for CalPERS’s communications with employers, such as issuing the circular letters, answering employer questions, and posting employer information on the CalPERS website. EAMD addressed the system and processing changes that needed to be made as a result of the transit employee exemption.

13. Upon the passage of the transit employee exemption, CalPERS decided that all transit employees hired after the enactment of PEPRA and identified as having rights protected under section 13(c) of UMTA were to be retroactively enrolled in the classic plan as of their date of hire. Once the federal district court issued its decision in State of California v. CalPERS determined that the transit employee exemption had ended, and that these transit employees were then subject to PEPRA. CalPERS determined that the transit employees would retain the classic benefits earned during the exemption, so that for the period of their employment between January 1, 2013 through December 29, 2014, service credit was earned at the classic benefit level. For the period of employment after December 30, 2014, service credit would be earned at the reduced PEPRA level. The service credit earned for each rate is reflected on the member’s Annual Members Benefit Statement. And, the two rates will be used by CalPERS to calculate the final compensation of the transit employees.

14. Transit employees are not the only CalPERS members that have mixed service, meaning that they will earn service credit at differing benefit levels over the course of their CalPERS membership. This can happen to individuals who became CalPERS members before 2013, left public service for a period of time, and then returned to public service after six months with a new employer. This member will accrue some service credit under the classic benefit formula, and accrue some service credit under the PEPRA benefit
formula. CalPERS has adopted a regulation regarding the calculation of final compensation of members who accrue service credit under different benefit formulas. (See Cal. CodeRegs., tit. 2, § 579.24.)

Statement of issues and respondents

15. After the Court of Appeal issued its decision in Public Employees' Retirement System, supra, 23 Cal.App.5th 1040, complainant filed a statement of issues against respondents, alleging that CalPERS had correctly implemented section 7522.02(a)(3)(A) by applying PEPRA to transit employees upon the issuance of State of California I on December 30, 2014. An amended statement of issues was issued on August 22, 2018.

16. Respondents VTA, and individual employees of San Francisco Bay Area Rapid Transit District (BART), La Keysha Dorsey, Jesse Gomes, Aaron Gwin, Lloyd Jackson II, Toni O’Connor, and Buddy Roark, each timely requested a hearing. BART did not file an appeal.9

17. Respondent VTA is a regional transit agency in Santa Clara County. VTA contracts with CalPERS to provide retirement benefits for its eligible employees. The provisions of VTA’s contract with CalPERS are set forth and governed by the California Public Employees’ Retirement Law (PERL) (§ 20000 et seq.) and PEPRA. VTA has transit employees whose rights are protected under UMTA and who were hired after the effective date of PEPRA and before the end of the transit employee exemption. VTA is appearing in this case on behalf of its transit employees hired during that time period, whom it refers to as “gap” employees.

18. Respondents Dorsey, Gomes, Gwin, Jackson, O’Connor, and Roark are transit employees of BART with collective bargaining rights protected under UMTA.10 BART contracts with CalPERS to provide a pension plan for these employees. As with VTA, BART’s contract with CalPERS is set forth and governed by the PERL and PEPRA.

19. Respondent O’Connor was hired by BART on January 7, 2013. Respondents Roark and Gwin were hired on March 4, 2013. Respondents Dorsey and Jackson were hired on March 25, 2013. Based on their dates of hire, CalPERS initially enrolled O’Connor,

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9 There are hundreds of other individual appeals pending before the Board. These appeals are by other BART transit employees, as well as individual transit employees of VTA and other California transit agencies. Following the Court of Appeal decision in Public Employees’ Retirement System, supra, 23 Cal.App.5th 1040, the parties agreed to administratively proceed initially with the six individual transit employees named as respondents in this case.

10 Respondents are members of Amalgamated Transit Union (ATU) Local 1555. ATU Local 1555 is affiliated with Amalgamated Transit Union International.
Roark, Gwin, Dorsey and Jackson as new members under PEPRA. After the passage of Assembly Bill No. 1222, CalPERS retroactively enrolled each of them as a classic member as of their hiring date. After CalPERS determined that the transit employee exemption had ended, these employees retained classic benefits from their date of hire to December 30, 2014, but were enrolled as new PEPRA members from December 31, 2014 forward.

20. Respondent Gomes was hired by BART on September 22, 2014. Because he was hired after the effective date of the transit employee exemption, Gomes was enrolled in CalPERS as a classic member. After CalPERS determined that the transit employee exemption had ended, Gomes retained classic benefits from his date of hire to December 30, 2014, and was enrolled as a PEPRA member from December 31, 2014 forward.

21. For BART transit employees with employment at the classic benefit level, service credit is earned at the benefit formula of two percent at age 55. For employment under PEPRA, service credit is earned at the reduced benefit level of two percent at age 62. At the classic benefit level, final compensation is calculated based on the highest average salary over 12 consecutive months. Under PEPRA, final compensation is calculated based on the highest average over three consecutive years. (§ 7522.20, subd. (a).) In many other respects, PEPRA benefits are less beneficial than those provided for in the Memorandum of Understanding between BART and ATU Local 155 in effect at the time of the passage of PEPRA. For example, under PEPRA, all employees are required to pay one-half of the cost of funding their pension. (§ 7522.30.) Under the negotiated terms of the Memorandum of Understanding, a transit employee’s share of costs is significantly less.

CalPERS publications/notifications regarding the transit employee exemption

22. On December 4, 2013, CalPERS issued a Circular Letter (No. 200-075-13) to employers regarding the implementation of the transit employee exemption. In this letter, it requested each employer to self-identify as an agency subject to the transit employee exemption. CalPERS referred employers seeking additional information about PEPRA and Assembly Bill No. 1222 to its website where it had posted, among other documents, “Frequently Asked Questions: Pension Reform Act of 2013” (hereafter FAQ’s).

23. At all times relevant to this proceeding, the FAQ’s carried the following disclaimer:

These frequently asked questions reflect CalPERS preliminary interpretation of the complex changes brought about by the Public Employees’ Pension Reform Act of 2013 (PEPRA) and related Public Employees’ Retirement Law (PERL) changes. Positions taken in these FAQs may change as additional review and analysis continue, or as a result of any follow-up “clean-up” legislation.
24. On December 4, 2013, CalPERS added a very brief section to its FAQ’s regarding the transit employee exemption. Among the questions posed was:

What will happen if the court rules that PEPRA does not impede the collective bargaining right of transit employees subject to Section 13(c) of the Federal Transit Act?

The answer CalPERS provided was:

Transit employees hired after the date of the court ruling will be new members, as defined under G.C. section 7522.04, and will be subject to PEPRA and the reduced benefits.

Thus, while CalPERS identified that transit employees hired after the court ruling would be subject to PEPRA, it did not specifically address the pension benefits of transit employees hired during the gap period before ending of the transit employee exemption.

25. In January 2014, CalPERS notified transit agencies of the requirements for certifying its impacted transit employees. Among other things, employers were advised that all qualifying employees would be "reprocessed by CalPERS using the classic formula."

26. On April 28, 2014, CalPERS expanded the information it provided regarding the transit employee exemption on the FAQ’s. This question was added:

If the employees are identified as qualified transit employees, will they be retroactively placed into the classic formula as of their date of hire?

CalPERS provided this answer:

Yes. If a new transit employee’s hire date is after January 1, 2013, the employee will be retroactively placed into the classic formula.

Thus, CalPERS identified that it would retroactively place transit employees hired during the gap period into the classic formula, but it did not address how the pension benefits of a qualified transit employee would be calculated after the transit employee exemption ended.

27. On February 25, 2015, CalPERS issued the circular letter referenced in Finding 5, which advised transit agencies of its conclusion that the transit employee exemption ended on December 30, 2014. CalPERS advised transit agencies that transit employees hired between January 1, 2013 and December 30, 2014, would retain the classic retirement benefits earned during that period, but from December 30, 2014, forward they would accrue reduced PEPRA retirement benefits.
The CalPERS publication on vested rights of members

28. In evidence is a July 2011 publication by CalPERS entitled “Vested Rights of CalPERS Members.” (Hereafter Vested Rights Publication.) In this publication, CalPERS characterizes its understanding of California decisional law regarding the Contract Clause of the California Constitution (art. I, § 9) as applied to the retirement benefit rights of public employees. CalPERS sets forth what it characterizes as seven general rules stemming from California decisional law. (Vested Rights Publication, at pp. 8-11.)

Rule 1 reads: “Employees are Entitled to Benefits in Place During their Employment.” In explaining this rule, CalPERS states:

Public employees obtain a vested right to the provision of applicable retirement law that exist [sic] during the course of their public employment. Promised benefits may be increased during employment, but not decreased, absent the employees’ consent.

The courts have established that this rule prevents not only a reduction in the benefits that have already been earned, but also a reduction in the benefits that a member is eligible to earn during future service. For example, a ballot proposition that purported to eliminate future benefit accruals for legislators was held unconstitutional because legislators were entitled to continue earning benefits under the law in place when they were first elected.

(Vested Rights Publication, at p. 8 [emphasis in original].)

Rule 6 reads: “Active Employees’ Vested Rights May Be Unilaterally Modified Only Under Extremely Limited Circumstances.” In the explanation of this rule, CalPERS discusses how courts analyze whether a modification to a pension plan is permissible. (Vested Rights Publication, at pp. 10-12.)

Issues presented

29. Respondents contend that CalPERS has failed to correctly implement section 7522.02(a)(3)(A) to transit employees in two primary respects. They argue:

a. The Legislature intended that transit employees who received classic benefits after the implementation of the transit employee exemption would continue receiving classic benefits for the remainder of their careers.
b. The transit employee exemption did not expire until January 1, 2016.

LEGAL CONCLUSIONS

1. As there is no statutory provision that provides otherwise, the standard of proof applied in this proceeding is preponderance of the evidence. (Evid. Code, § 115.) Respondents bear the burden of establishing each fact essential to the claim for relief they are asserting. (Evid. Code, § 500; McCoy v. Board of Retirement (1986) 183 Cal.App.3d 1044, 1055, fn. 5.)

In enacting Assembly Bill No. 1222 did the Legislature intend for transit employees to earn classic benefits for the rest of their careers?

2. CalPERS interprets section 7522.02(a)(3)(A) as creating a time-limited exemption from PEPRA for transit employees at the end of which they become subject to PEPRA. Respondents argue that the Legislature intended for transit employees to be permanently exempted from PEPRA for the rest of their careers.

Because the parties are fundamentally at odds regarding the meaning of section 7522.02(a)(3)(A), it is useful to restate the general principles of statutory construction, as well as those principles applicable to this case. As summarized by the California Supreme Court in People v. Pieters (1991) 53 Cal.3d 894, 898-899:

The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] But "[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." [Citations.] Thus, "[t]he intent prevails over the letter, and the letter will, if possible, be read as to conform to the spirit of the act." [Citations.] Finally, we do not construe statutes in isolation, but rather read every statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness."

(Citation omitted; see also McLaughlin v. State Board of Equalization (1999) 75 Cal.App.4th 196, 200-201.)

The first step of statutory interpretation is to scrutinize the actual words of the statute, giving them "their usual and ordinary meaning." (Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1386; accord Imperial Merchant Services, Inc. v. Hunt (2009) 47 Cal.4th 381, 387.) Where the statutory language is clear and unambiguous, there
is no need to construe the statute, and resorting to legislative materials or other external sources is unnecessary. (California Fed. Savings & Loan Assn. v. City of Los Angeles (1995) 11 Cal.4th 342, 349.) But if the statutory language permits more than one reasonable interpretation, consideration may be made of the statute’s purpose, legislative history, and public policy. (Imperial Merchant Services, Inc. v. Hunt, supra, 47 Cal.4th at p. 388.)

The language of the statute is clear and unambiguous in one aspect: the Legislature intended to create a time-limited exemption from PEPRA for transit employees pending federal court resolution of PEPRA’s alleged conflict with 13(c) of UMTA. Where the statutory language is not clear is the intent regarding the pension benefits to be afforded the transit employees after the transit employee exemption ended.

In answering this question, one must adopt the construction that comports most closely with the legislative intent, with a view to promote, not defeat, the statute's general purpose, and to avoid a construction that would lead to unreasonable, impracticable or arbitrary results. (Imperial Merchant Services, Inc. v. Hunt, supra, 47 Cal.4th at p. 388.) And, because section 7522.02(a)(3)(A) is an exception to PEPRA, consideration must also be given to the legislative intent in enacting PEPRA. It must be assumed that the Legislature has existing laws in mind when it enacts a statute. (Bailey v. Superior Court (1977) 19 Cal.3d 970, 977-978, fn. 10.) A statute must be read in context, examining other legislation on the subject to ascertain probable intent. (California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 632-633; Quarterman v. Kefauver (1997) 55 Cal.App.4th 1366, 1371.) In other words, section 7522.02(a)(3)(A) must be read in light of PEPRA and harmonized with PEPRA so that the legal effect of both PEPRA and the transit employee exemption may be carried out. (Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735.)

The intent of the Legislature in enacting PEPRA was recently summarized by the California Supreme Court in Cal Fire Local 2881 v. California Public Employees' Retirement System (2019) 6 Cal.5th 965, 974-975:

The centerpiece of PEPRA was a pension plan applicable only to newly hired public employees that is less expansive, and therefore less burdensome for the state and local governments, than the plans governing then-existing employees' pensions.

Thus, as interpreted by the California Supreme Court, the overarching intent of the Legislature in enacting PEPRA was to reduce the pension obligations of state and local agencies across California. The Legislature made PEPRA broadly applicable to California public employers and public pension plans or after January 1, 2013, with few exceptions save for the University of California and certain charter cities and counties. (§ 7522.02.)

The transit employee exemption was part of an act that the Legislature declared to be urgency legislation to become effective immediately. (Stats. 2013, ch. 527, § 3.) In passing urgency legislation, the Legislature “as a whole has spoken” (People v. Wade (2016) 63
Cal.4th 137, 143), when it declared the following facts constituted the necessity for the immediate effect:

In order to preserve the funding for essential transportation infrastructure projects while balancing the public's need to control the cost of public employee pension benefits it is necessary that this measure take effect immediately.

Often cited in the legislative committee reports, and probative of legislative intent (Knighten v. Sam's Parking Valet (1988) 206 Cal.App.3d 69, 77) is a press release issued by Governor Edmund G. Brown, Jr., regarding Assembly Bill No. 1222. The press release provided in relevant part:

“Federal transit money creates jobs and this legislation keeps those funds flowing while allowing the state to defend in court our landmark pension reforms,” said Governor Brown.

This morning the U.S. Department of Labor notified the Sacramento Regional Transit District that it is refusing to certify millions of dollars in transit grants to the district because it asserts that the provisions of the California Public Employee Pension Reform Act of 2013 (PEPRA) are incompatible with federal labor law.

The proposed legislation will temporarily exempt local agencies' transit workers from PEPRA, but preserves the state's ability to fight for the pension reform law in court. The legislation also creates a $26 million state loan program to assist transit operators, like Sacramento Regional Transit, that are at risk of losing federal transit grants.

(Governor's Press Release (Sept. 4, 2013).)

Also instructive in ascertaining legislative intent is the Legislative Counsel's Digest regarding Assembly Bill No. 1222. (Jones v. Lodge at Torrey Pines Partnership (2008) 42 Cal.4th 1158, 1169-1170.) The bill summary provided by the Legislative Counsel's Digest reads:

The California Public Employees' Pension Reform Act of 2013 (PEPRA), among other things, establishes new retirement formulas for employees first employed on or after January 1, 2013, which a public employer offering a defined benefit pension plan is prohibited from exceeding, requires those employees to contribute a specified percentage of the normal cost of the defined pension plan, and prohibits public employers
from paying an employee’s share of retirement contributions. PEPRA excepts certain retirement systems from its provisions.

This bill would except from PEPRA public employees whose collective bargaining rights are subject to specified provisions of federal law until a specified federal district court decision on a certification by the United States Secretary of Labor . . . or until January 1, 2015, whichever is sooner. The bill would also provide that if a federal district court upholds the determination of the United States Secretary of Labor . . . that application of PEPRA to those public employees precludes certification, those employees are excepted from PEPRA. The bill would authorize the Director of Finance to authorize a loan of up to $26,000,000 from the Public Transportation Account in the State Transportation Fund to be made to local mass transit providers in amounts equal to the federal transportation grants not received due to noncertification from the federal Department of Labor, as specified. By providing for loans in the manner specified, this bill would make an appropriation. The bill would prescribe requirements regarding the disbursement of these funds. The bill would require a local transit provider to repay the loan based on the occurrence of certain contingencies by January 1, 2019.

This bill would declare that it is to take effect immediately as an urgency statute.

(Legis. Counsel’s Dig., Stats. 2013, ch. 527.)

Thus, the two overarching goals of the urgency legislation establishing a transit employee exemption were to ensure that California continued receiving federal transit dollars so that California transit projects could proceed while also balancing PEPRA’s goal of controlling the cost of public employee pension benefits.

In enacting section 7522.02(a)(3) the Legislature recognized that California could lose in its litigation with DOL over the certifications, and for that reason, it authorized a permanent exemption for transit employees in that event. (§ 7522.02(a)(3)(B).) But that was the only stated event for which the Legislature authorized a permanent exemption from PEPRA for transit employees. Absent that event, the Legislature sought to limit the time in which transit employees were exempt from PEPRA. This is made clear by the Legislature setting an absolute sunset date for the transit employee exemption without regard to whether if by that date a federal district court had found that DOL had erred in denying certification. (§ 7522.02(a)(3)(A).) For these reasons, the transit employee exemption must be read narrowly and it must be read in a manner which harmonizes with the pension funding reforms of PEPRA.
CalPERS has followed this approach in its narrow reading of the transit employee exemption, and its application of PEPRA to all transit employees at the end of the exemption period. To read the transit employee exemption in the broad manner suggested by respondents—that transit employees hired during the exemption period earn classic benefits for the remainder of their careers—is inconsistent with the purpose of PEPRA to reduce, not expand, public pension obligations. Certainly nothing in the summary by the Legislative Counsel, which although not binding is entitled to great weight (Jones v. Lodge at Torrey Pines, supra, 42 Cal.4th at pp. 1169-1170), would support such an expansive reading.

Respondents rely upon the Bill Analysis of Assembly Bill No. 1222 written by the Department of Finance, in support of their position. This analysis states in relevant part:

This bill is intended to temporarily end the 13(c) dispute by exempting represented transit employees from PEPRA, allowing for the continuation of federal transit grants to local agencies until the matter is resolved in federal court. This bill provides a mechanism for a test case over the Sacramento transit grants. If Sacramento successfully defends its ability to implement PEPRA, then PEPRA will apply to all transit employees, hired after the date of the ruling, whose collective bargaining rights are protected by 13(c). If Sacramento loses, the exemption from PEPRA for transit employees becomes permanent.

(Cal. Dept. of Finance, Bill Analysis on Assem. Bill No. 1222 (2013-2014 Reg. Sess.) Sept. 5, 2013 [emphasis added].) Respondents argue that the emphasized language evidences the Legislature’s intent for transit employees hired prior to the date of the ruling to be given classic benefits for the remainder of their careers. This is an expansive reading of the cited paragraph.

But even if the Department of Finance comment could be read that broadly, none of the other legislative materials submitted in evidence contain corresponding language. More typical are legislative reports that do not discuss the fiscal impact on a public agency from the transit employee exemption but focus on the fiscal impact to the state from federal decertification of transit grants. (See e.g., Sen. Public Employment & Retirement, Public Employees’ Pension Reform Act of 2013 (PEPRA): Exemption for Protected Transit Workers, Assem. Bill No. 1222 (2103-2014 Reg. Sess.), Sept. 5, 2013.) Where fiscal impact on a public agency is referenced, generalized comments are made, such as this:

An estimate of actuarial costs/savings from exempting these employees from PEPRA is not available as it is not known how many employees will be affected at this time.

(Sen. Rules Committee, Office of Senate Floor Analysis, Assem. Bill No. 1222 (2013-2014 Reg. Sess.), Sept. 6, 2013, p. 6.) Because the Department of Finance Bill Analysis stands alone among the multitudes of legislative committee reports and other materials presented in
evidence regarding Assembly Bill No. 1222, it is given little weight as an aid to
interpretation.

In support of their broad reading, respondents cite to failed Assembly Bill No. 1640,
which would have granted classic benefits for life to transit employees hired before
December 30, 2014. Respondents argue that this failed legislation should guide the
interpretation of the transit employee exemption. In so arguing, they emphasize VTA's
proffered explanation of the reason for bill's failure. (See fn. 6, ante.) Little weight can be
given to the hearsay explanation for the failure of Assembly Bill No. 1640. But even if the
explanation were entitled to greater weight, it does not instruct the determination of
legislative intent in enacting section 7522.02(a)(3)(A) three years earlier. The law is clear
that there is relatively little value in examining an existing statute in light of proposed
amendments which have not been approved. (Sav-On Drugs, Inc. v. County of Orange
(1987) 190 Cal.App.3d 1611, 1623.) It is the intent of the Legislature which adopted section
7522.02(a)(3)(A) in its present form that governs, not that of a subsequent Legislature which
failed to pass an amendment to it. (Cf. Burgess v. Board of Education (1974) 41 Cal.App.3d
571, 580-581.)

Respondents argue that the interpretation of section 7522.02(a)(3)(A) by CalPERS
runs counter to the general rule that pension legislation should be liberally construed, and
any ambiguity or uncertainty resolved in favor of the pensioner. Notwithstanding this
general rule, construction of pension legislation must be consistent with the clear language
and purpose of the statute. (Ventura County Deputy Sheriffs’ Assn v. Board of Retirement
822 ["this rule of liberal construction is applied for the purpose of effectuating the obvious
legislative intent [citation] and should not blindly be followed so as to eradicate the clear
language and purpose of the statute"]). The construction suggested by respondents is not
consistent with the purposes of PEPRA or the transit employee exemption.

Respondents take issue with the manner in which CalPERS has implemented PEPRA
to transit employees, arguing that the Legislature did not authorize CalPERS to implement a
mixed or hybrid pension for them. The Legislature did not instruct CalPERS how to
implement PEPRA to transit employees once the transit employee exemption ended; it left
that decision-making to the administrative agency. Nothing in the conduct of CalPERS in
this regard has been shown to exceed its authority either under the PERL or under PEPRA.

Finally, respondents argue that the approach of CalPERS to transit employees
conflicts with its own policies on vested benefit rights and its fiduciary obligations to its
members. (Cal. Const., art. XVI, § 17, subd. (b) [setting retirement board members’ duties].) In
support of this argument, respondents cite to a CalPERS publication on vested rights,
partially summarized in Finding 28, and argue that CalPERS has violated its own policy in
its treatment of transit employees. As noted most recently by the California Supreme Court,
whether a provision of law creates a vested pension right is a question of constitutional law
not of pension law. (Cal Fire Local 2881 v. California Public Employees' Retirement
System, supra, 6 Cal.5th 965, 994 [finding no vested right in the opportunity to purchase
additional retirement service). With respect to this exact publication, the high court held that a legal opinion expressed therein by CalPERS does not create a vested right, and is not entitled to judicial deference when determining a question of constitutional law. *(Ibid.)*

Respondents point to the FAQ's, referenced in Findings 22 through 24 and 26, and argue that CalPERS “assured” transit employees that they would fall under the laws governing classic employees for their careers. The FAQ’s issued by CalPERS do not appear to have made any such assurances. But assuming for purposes of argument that they did, readers were advised that the FAQ’s were preliminary interpretations by CalPERS and were subject to change over time.

In conclusion, respondents have failed to establish that the Legislature intended for respondent transit employees to earn classic benefits for the remainder of their careers. Respondents have therefore failed to establish that CalPERS erroneously applied PEPRA to them upon the expiration of the transit employee exemption.

**Did the transit employee exemption expire on December 30, 2014?**

3. CalPERS has determined that the transit employee exemption ended on December 30, 2014, the date the federal district court issued the first of its opinions in *State of California I*. Respondent transit employees contend that the transit employee exemption continued in operation to the sunset date of January 1, 2016. The sunset date governs, they argue, because the federal litigation was ongoing until the federal district court issued its final opinion in *State of California IV*. Under this analysis, respondent transit employees would receive classic benefits for an additional one-year period, and the pool of transit employees eligible to receive classic benefits would expand accordingly.

By its terms, the transit employee exemption ended when either “a federal district court rules that the United States Secretary of Labor . . . erred” in determining that section 13(c) of UMTA precludes certification, or on January 1, 2016, whichever occurred first. *(§ 7522.02(a)(3)(A).)* It is correct that the litigation between California and DOL did not conclude until January 2018. But the Legislature did not set finality of the litigation or the issuance of a final judgment as the triggering event for the end of the transit employee exemption. The triggering event set by the Legislature was a ruling by a federal district court that DOL had erred in determining that section 13(c) precluded certification of transit grants for California. The district court made such a ruling in *State of California I*, issued on December 30, 2014. The transit employee exemption ended with that event.

Respondent transit employees have failed to establish that CalPERS erred in determining that the transit employee exemption ended on December 30, 2014.

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11 Respondent VTA does not challenge the determination by CalPERS that the transit employee exemption ended on December 30, 2014.
Conclusion

4. As set forth in Legal Conclusions 2 and 3, respondents have failed to demonstrate that CalPERS erred in its application of PEPRA to respondent transit employees.

5. Any contentions made by the parties and not addressed herein are found to be without merit.

ORDER

The appeals of respondents Santa Clara Valley Transportation Authority, La Keysha Dorsey, Jesse Gomes, Aaron Gwin, Lloyd Jackson II, Toni O'Connor, and Buddy Roark are denied.

DATE: April 29, 2019

[Signature]

MELISSA G. CROWELL
Administrative Law Judge
Office of Administrative Hearings