MATTHEW GOLDBERG
Arbitrator ◆ Mediator ◆ Attorney at Law
130 Capricorn Avenue
Oakland, California 94611

IN ARBITRATION PROCEEDINGS PURSUANT TO

AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy between: IFPTE LOCAL 21, ENGINEERS SOCIETY; and IFPTE LOCAL 21, PROFESSIONAL MANAGERS ASSOCIATION, Grievants, and SANTA CLARA VALLEY WATER DISTRICT, Employer. Re: Pension Contribution Dispute	ARBITRATOR'S OPINION AND AWARD

This arbitration arises pursuant to a Collective Bargaining Agreement between **IFPTE LOCAL 21 ENGINEERS SOCIETY**; and **IFPTE Local 21 PROFESSIONAL MANAGERS ASSOCIATION**, (referred to below as "ES" and "PMA," respectively, and "Unions" or "grievants," collectively), and **SANTA CLARA VALLEY WATER DISTRICT**, (referred to below as "District" or "Employer"). Under its terms, **MATTHEW GOLDBERG** was selected from the permanent panel to serve as neutral Arbitrator and render a final and binding decision.

A hearing in this matter was conducted on November 13, 2013 in San Jose, California. All parties had full opportunity to examine and cross-examine witnesses, and to submit evidence and argument. Posthearing briefs were received on or about January 29, 2014.

APPEARANCES:

On behalf of the Union:

CHRISTOPHER E. PLATTEN, Esq. of **WYLIE, MCBRIDE, PLATTEN & RENNER**, 2125 Canoas Garden Avenue, Suite 120, San Jose, California 95125

On behalf of the District:

BRIAN C. HOPPER, Esq., **OFFICE OF DISTRICT COUNSEL**, 5750 Almaden Expressway, San Jose, California 95118-3686

THE ISSUES

The parties were unable to agree on a statement of the issue to be decided here. The Union would phrase the issue:

> Do the MOU's require employees hired on or after January 1, 2013 to contribute 3 percent of the pensionable compensation towards the District's costs of the employer contribution towards pension benefits, and, if not, what should be the remedy?

From the District's perspective, the issues should be:

> 1. Did the District comply with the provisions of Assembly Bill 340 by requiring that "new members" as defined by the bill, be subject to a retirement benefit formula and be required to contribute 3% of the employer's required contribution? If not, what is the remedy?
>
> 2. Was the District's implementation of Assembly Bill 340 consistent with the requirements of the Meyers-Milias-Brown Act? If not, what is the remedy?

Pursuant to the parties' stipulation granting the Arbitrator the authority to frame the issue once all the evidence and argument was received, the question to be determined is

> Do either the MOU's or PEPRA require employees hired on or after January 1, 2013 to contribute 3 percent of their pensionable compensation towards the District's costs of the employer contribution towards pension benefits, and, if not, what should be the remedy?

RELEVANT CONTRACT SECTIONS[1]
PMA MOU

ARTICLE 1. RECOGNITION

The District formally recognizes the Professional Managers Association (PMA) as the majority representative of those classes of employees and units listed in Attachment 1, hereto.

ARTICLE 6. PENSION BENEFITS

Section 1. PERS Pension

The District will continue to participate in the California Public Employees' Retirement System (PERS) with benefits as currently provided at the 2.5% @ 55 Formula Benefit Level for employees hired prior to January 1, 2012. Employees hired January 1, 2012 or thereafter will participate in PERS with benefits provided in the contract with PERS at the 2% @ 60 Formula Benefit Level.

Employees will reimburse the District 3.0% of the cost of the employer's annual required contribution of the 2.5% @ 55 Formula Benefit Level through direct payroll deductions. Employees will pay the full 8.0% of the PERS employee (member) contribution. Employees hired under the 2.0% @ 60 Formula Benefit Level will reimburse the District 3.0% of the employer's annual required contribution. Employees will pay the full 7.0% of the PERS employee (member) contribution. These deductions will be pre-tax.

ARTICLE 14. GRIEVANCE PROCEDURE

Section 5. Duty of the Arbitrator

Except when an agreed statement of facts is submitted by the parties, it shall be the duty of the arbitrator to hear and consider evidence submitted by the parties and thereafter make written findings of fact and a disposition of the grievance which shall be binding. The decision of the arbitrator shall not add to, subtract from, or otherwise modify the terms and conditions of this MOU.

ARTICLE 23. MISCELLANEOUS

Section 1. Full Agreement

It is understood and agreed that this MOU represents a complete and final understanding on all negotiable issues between the District and the PMA. This MOU supersedes all previous memoranda of understanding, Side Letters or Letters of Agreement between the District and the PMA except as specifically referred to in this MOU. . . .

[1]There are two separate MOU's governing this matter, one covering the PMA bargaining unit and one covering the ES bargaining unit. The relevant language in the two is identical, but found in different sections of the respective Contracts.

Section 2. Savings Clause

If any provision of this MOU should be held invalid by operation of law, or by any court of competent jurisdiction, or if compliance with, or enforcement of, any provision should be restrained by any tribunal, the remainder of this MOU shall not be affected thereby, and the parties shall enter into negotiations when requested by either party, for the sole purpose of arriving at a mutually satisfactory replacement for such provision.

ES MOU

ARTICLE 1. RECOGNITION

The District formally recognizes the Engineers Society (Society) as the majority representative of those classes of employees and units listed in Attachment 1, hereto

ARTICLE 6. PENSION BENEFITS

Section 1. PERS Pension

The District will continue to participate in the California Public Employees' Retirement System (PERS) with benefits as currently provided at the 2.5% @ 55 Formula Benefit Level for employees hired prior to January 1, 2012. Employees hired January 1, 2012 or thereafter will participate in PERS with benefits provided in the contract with PERS at the 2% @ 60 Formula Benefit Level.

Employees will reimburse the District 3.0% of the cost of the employer's annual required contribution of the 2.5% @ 55 Formula Benefit Level through direct payroll deductions. Employees will pay the full 8.0% of the PERS employee (member) contribution. Employees hired under the 2.0% @ 60 Formula Benefit Level will reimburse the District 3.0% of the employer's annual required contribution. Employees will pay the full 7.0% of the PERS employee (member) contribution. These deductions will be pre-tax.

ARTICLE 15. GRIEVANCE PROCEDURE

Section 5. Duty of the Arbitrator

Except when an agreed statement of facts is submitted by the parties, it shall be the duty of the arbitrator to hear and consider evidence submitted by the parties and thereafter make written findings of fact and a disposition of the grievance which shall be binding. The decision of the arbitrator shall not add to, subtract from, or otherwise modify the terms and conditions of this MOU.

ARTICLE 26. MISCELLANEOUS

Section 1. Full Agreement

It is understood and agreed that this MOU represents a complete and final understanding on

all negotiable issues between the District and the Society. This MOU supersedes all previous memoranda of understanding, Side Letters or Letters of Agreement between the District and the PMA except as specifically referred to in this MOU. . . .

Section 2. Savings Clause

If any provision of this MOU should be held invalid by operation of law, or by any court of competent jurisdiction, or if compliance with, or enforcement of, any provision should be restrained by any tribunal, the remainder of this MOU shall not be affected thereby, and the parties shall enter into negotiations when requested by either party, for the sole purpose of arriving at a mutually satisfactory replacement for such provision.

PERTINENT SECTIONS OF THE CALIFORNIA PUBLIC EMPLOYEES PENSION REFORM ACT OF 2013 ("PEPRA")

Assembly Bill No. 340

LEGISLATIVE COUNSEL'S DIGEST

(1)* * *

This bill would require a public retirement system, as defined, to modify its plan or plans to comply with this act. The bill would establish new retirement formulas that could not be exceeded by a public employer offering a defined benefit pension plan, setting the maximum benefit allowable for employees first hired on or after January 1, 2013, as a formula commonly known as 2.5% at age 67 for nonsafety members. . . .

The bill would prohibit a public employer from making contributions on behalf of a person who first becomes a member on or after January 1, 2013, to any qualified retirement plan based on any portion of compensation that exceeds an amount specified in federal law. . . .

(3) * * *

The bill would require public employees who are first employed on or after January 1, 2013, and who contribute to a defined benefit plan to contribute at least ½ of the annual actuarially determined normal costs. . . .

(5)* * *

This bill, on or after January 1, 2013, would prohibit a public retirement system from allowing the purchase of nonqualified service credit. . . .

Article 4. California Public Employees' Pension Reform Act of 2013[2]

7522.02(a) (1) Notwithstanding any other law, except as provided in this article, on and

[2]All references are to the California Government Code.

after January 1, 2013, this article shall apply to all state and local public retirement systems and to their participating employers. . .

(b) The benefit plan required by this article shall apply to public employees who are new members as defined in Section 7522.04.

(d) If a public employer, before January 1, 2013, offers a defined benefit pension plan that provides a defined benefit formula with a lower benefit factor at normal retirement age that results in a lower normal cost than the defined benefit formula required by this article, that employer may continue to offer that defined benefit formula instead of the defined benefit formula required by this article, and shall not be subject to the requirements of Section 7522.10. . . . . However, if the employer adopts a new defined benefit formula on or after January 1, 2013, that formula must conform to the requirements of this article or be must be determined and certified by the retirement system's chief actuary and the retirement board to have no greater risk and no greater cost to the employer than the defined benefit formula required by this article and must be approved by the Legislature. New members may only participate in the lower cost plan in place before January 1, 2013, or a defined benefit formula that conforms to the requirements of this article, or is approved by the Legislature as provided in this subdivision.

(e) If a public employer, before January 1, 2013, offers a retirement benefit plan that consists solely of a defined contribution plan, that employer may continue to offer that plan instead of the defined benefit pension plan required by this article. However, if the employer adopts a new defined benefit pension plan or defined benefit formula on or after January 1, 2013, that plan or formula must conform to the requirements of this article or must be determined and certified by the retirement system's chief actuary and the system's board to have no greater risk and no greater cost to the employer than the defined benefit formula required by this article and must be approved by the Legislature. New members of the employer's plan may only participate in the defined contribution plan that was in place before January 1, 2013, or a defined contribution plan or defined benefit formula that conforms to the requirements of this article.

7522.04 For the purposes of this article:

(a) "Defined benefit formula" means a formula used by the retirement system to determine a retirement benefit based on age, years of service, and pensionable compensation earned by an employee up to the limit defined in Section 7522.10.

(b) "Employee contributions" means the contributions to a public retirement system required to be paid by a member of the system, as fixed by law, regulation, administrative action, contract, contract amendment, or other written agreement recognized by the retirement system as establishing an employee contribution.

(d) "Member" means a public employee who is a member of any type of a public retirement system or plan.

(e) "New employee" means either of the following:
(1) An employee, including one who is elected or appointed, of a public employer who

is employed for the first time by any public employer on or after January 1, 2013, and who was not employed by any other public employer prior to that date.

(2) An employee, including one who is elected or appointed, of a public employer who is employed for the first time by any public employer on or after January 1, 2013, and who was employed by another public employer prior to that date, but who was not subject to reciprocity under subdivision (c) of Section 7522.02.

(f) "New member" means any of the following:

(1) An individual who becomes a member of any public retirement system for the first time on or after January 1, 2013, and who was not a member of any other public retirement system prior to that date.

(2) An individual who becomes a member of a public retirement system for the first time on or after January 1, 2013, and who was a member of another public retirement system prior to that date, but who was not subject to reciprocity under subdivision (c) of Section 7522.02.

(3) An individual who was an active member in a retirement system and who, after a break in service of more than six months, returned to active membership in that system with a new employer. For purposes of this subdivision, a change in employment between state entities or from one school employer to another shall not be considered as service with a new employer. "Normal cost" means the portion of the present value of projected benefits under the defined benefit that is attributable to the current year of

(g) "Normal cost" means the portion of the present value of projected benefits under the defined benefit that is attributable to the current year of service, as determined by the public retirement system's actuary according to the most recently completed valuation...

7522.15. Each public employer. . . that offers a defined benefit plan shall offer only the defined benefit formulas established pursuant to Sections 7522.20 and 7522.25 to new members.

7522.20 (a) Each retirement system that offers a defined benefit plan for nonsafety members of the system shall use the formula prescribed by this section. The defined benefit plan shall provide a pension at retirement for service equal to the percentage of the member's final compensation set forth opposite the member's age at retirement, taken to the preceding quarter year, in the following table, multiplied by the number of years of service in the system as a nonsafety member. A member may retire for service under this section after five years of service and upon reaching 52 years of age.

Age of Retirement	Fraction	
52	1.00	...
521/4	1.025	
*	*	
62	2.000	

7522.30 (a) This section shall apply to all public employers and to all new members. Equal sharing of normal costs between public employers and public employees shall be the standard. The standard shall be that employees pay at least 50 percent of normal costs and that

employers not pay any of the required employee contribution.

c) New members employed by those public employers defined in paragraphs (2) and (3) of subdivision (I) of Section 7522.04, the Legislature, the California State University, and the judicial branch who participate in a defined benefit plan shall have an initial contribution rate of at least 50 percent of the normal cost rate for that defined benefit plan, rounded to the nearest quarter of 1 percent, unless a greater contribution rate has been agreed to pursuant to the requirements in subdivision (e). This contribution shall not be paid by the employer on the employee's behalf.

(e) Notwithstanding subdivision (c), employee contributions may be more than one-half of the normal cost rate if the increase has been agreed to through the collective bargaining process, subject to the following conditions:

(1) The employer shall not contribute at a greater rate to the plan for nonrepresented, managerial, or supervisory employees than the employer contributes for other public employees, including represented employees, of the same employer who are in related retirement membership classifications.

(2) The employer shall not increase an employee contribution rate in the absence of a memorandum of understanding that has been collectively bargained in accordance with applicable laws.

(3) The employer shall not use impasse procedures to increase an employee contribution rate above the rate required by this section.

(f) If the terms of a contract, including a memorandum of understanding, between a public employer and its public employees, that is in effect on January 1, 2013, would be impaired by any provision of this section, that provision shall not apply to the public employer and public employees subject to their contract until the expiration of their contract. A renewal, amendment, or other extension of that contract shall be subject to the requirements of this section.

FACTS

These grievances challenge the manner in which the District is assessing pension contributions as a result of its implementation of the mandate contained in the Public Employees' Pension Reform Act ("PEPRA"), enacted in September, 2012. As shown above, Article 6, the Pension Benefits Article of the parties' Agreements, provides for two tiers of pension benefit formulas: 2.5% @ 55 and 2% @ 60,[3] depending on date of hire. In response to the enactment of PEPRA, the District introduced a third tier, 2% at 62, for employees hired after January 1, 2013, the date the statute became effective. These most recent members were

[3] 2.5% for every year of service with a retirement age of 55, and 2% for every year of service with a retirement age of 60.

also required, like their fellow employees, to pay 3% of the District's annual required contribution ("ARC").

The District received a circular from CalPERS on December 3, 2012, setting forth that agency's interpretation of the statute. The circular notes that the "reduced benefit formulas and increased retirement age provisions under PEPRA create new defined benefit formulas" for all non-safety members hired after January 1, 2013. These new formulas would be "merged with the employer's existing optional provisions, with some exceptions, . . ., to create the new benefit groups." The circular further states that "[f]or new miscellaneous members. . . the new defined benefit formula is 2% at age 62. . . . ." With regard to cost sharing of Employer contributions, the circular provides:

> Some public agencies have amended their CalPERS contract to have their members pay a portion of the employer's contribution. These contributions are paid in addition to the member contribution rate. Under existing law, such employer cost sharing contract amendments were required to be tied to a benefit improvement. This requirement will be eliminated as of January 1, 2013, when the new amendments to the PERL [Public Employees' Retirement Law] go into effect. In addition, under the new law, cost sharing agreements may differ by bargaining unit or for classifications of employees subject to different benefit levels as agreed to in an MOU.

On December 21, 2012, the District notified the Unions that it would be introducing a third tier as part of its implementation of PEPRA, whereby employees hired after January 1, 2013 would be placed in the new 2% @62 formula.[4] With respect to the employee share of the ARC,

> [S]imilarly situated District employees under the same classifications are required to pay 3% towards the employer's ARC in addition to paying their employee contribution. . . . Limiting new members' contribution to 50% of the total normal cost would mean that the District could not receive the new members' 3% contribution towards the employer's ARC. Because this would undermine the terms of the District's current MOU with EA, it would constitute an impairment of contract.

The ES and PMA units each filed grievances. These initial grievances sought a

[4]The first individual deemed by the District to be subject to the 2% at 62 tier was Jack Xu, who was hired on March 18, 2013.

resolution whereby new employees hired after January 1, 2013 would not be required to make the 3% contribution to the Employer's ARC "since the [2% at 62 benefit] formula is not mentioned in the MOU." A joint, amended grievance filed by the Unions on February 4, 2013 seeks to resolve the matter on the basis that employees hired after January 1, 2013 be placed in the 2% at 60 "due to the fact that it is the only benefit formula that would apply to a new hire as it currently exists in the contract and to be made whole in every way."

On December 17, 2013, Arbitrator Barry Winograd issued an Award involving a grievance filed with the Employer by AFSCME Local 101[5] based on the identical contract language under examination here. The parties did not stipulate to the issue to be decided in that matter, and it was framed by Arbitrator Winograd as:

> Did the District violate the MOU and/or California bargaining law[6] by failing to negotiate over changes instituted by the District for pension benefits as announced on December 21, 2012; if so, what is the appropriate remedy?

Winograd found those violations. He reasoned that the District had a duty to bargain about changes to a mandatory subject which had already been negotiated. Article 6 referred to only two tiers of benefit levels applicable to pre- and post- 2012 employee hires, the formula rates for each, and the reimbursement contribution each tier would pay. "In this context, there was no clear waiver in the MOU which would justify the District's later action adding a new third tier, at least not before the end of 2014."

Winograd wrote that PEPRA was "silent as to its impact on pension formulas under existing labor agreements." That silence "does not constitute a supersession provision excluding the PEPRA from restrictions generally applicable to MOUs." With regard to the

[5]Local 101 represents a wide range of different classifications of District employees, including mechanics, maintenance workers, hydrologists, surveyors, water plant operators, accountants, biologists, chemists and assorted technicians and analysts.

[6]The Union had filed charges with PERB which were deferred to arbitration.

amount of the District's contribution which was payable by employees, "this as a subject for collective bargaining, bars impairment of existing labor agreements, and postpones any change to the end of the term of the agreement. . . ."

In his Award, Arbitrator Winograd ordered that District "cease and desist from implementation of the PEPRA. . . . until the parties have had an opportunity to meet and confer in good faith," and to treat employees hired after January 1, 2013 "as if they are employees subject to Article 6.1.B of the MOU, that is, as new hires after January 1, 2012."

After receiving the Decision, the District sent a letter to CalPERS asking whether it would allow new members to be placed in the 2% @ 60 benefit formula pursuant to the Award, and whether the 2% @ 62 formula was mandatory. CalPERS sent a response, dated January 16, 2014, stating

> CalPERS does not have the authority to allow new members to be placed in a retirement formula other than what is stated by law under Government Code Section 7522 which only allows the retirement formula of 2% @ 62 for new members.
>
> [PEPRA] supersedes any existing labor agreements. However, there is an exception where an employer can impair employer paid member contributions and/or the normal member contribution rate until the MOU [is] amended, extended, renewed or expires.

POSITION OF THE UNION

The District is in violation of the clear and unambiguous language of Article 6 of the MOU's. That provision limits employee cost sharing of pension contributions to those employees participating in either the 2.5% at 55 or the 2% at 60 Formula Benefit Levels. Employees participating in any other benefit levels do not participate in cost-sharing of the District's pension contributions.

Neither party asserts that the relevant language of Article 6 is ambiguous. Under it, only those employees in the pension benefit levels provided for in Article 6 are required to make

additional contributions toward the District's pension costs. No general requirement for employee cost-sharing exists, regardless of the retirement benefit formula of the employee.

The recent decision by Arbitrator Winograd, interpreting the same contract language, is instructive on this point:

> Article 6 of the MOU was a complete text spelling out two tiers of employees–pre and post 2012–the formula rates for each, and the reimbursement contribution each tier would pay. The provisions in Article 6 for the two tiers refer only to those tiers, which were negotiated together as part of the successor bargaining that took place in 2011.

The District argues that employees hired on or after January 1, 2013 are required to reimburse the District's pension contribution costs based solely on the enactment of the PEPRA. However, reliance on the provisions of PEPRA for this argument is misplaced. First, nothing in PEPRA requires employee cost-sharing of employer pension contribution costs. Such cost sharing is only permitted under the Public Employees' Retirement Law ("PERL") if it is the product of a collective bargaining agreement. Cost-sharing cannot be unilaterally imposed. Second, under Article 6, employees hired after January 1, 2013 are only required to reimburse pension costs if they are placed in either of the two existing benefit tiers.

PEPRA provides that "new members" or members hired after January 1, 2013 are to be placed in a new 2% at 62 retirement formula. The District has hired a number of these "new members." Nothing in the statute requires any cost-sharing of pension contributions for these new members, and neither do the MOU's, since the obligation for employee reimbursement of 3% for District pension contribution costs is defined and limited by Article 6 to employees other than "new members." Under Article 14 of both MOU's, the Arbitrator is precluded from "adding" to their language MOU's which would result if it were determined that employees with pension benefit formulas other than those listed in Article 6 are required to reimburse the District 3% of its pension contribution costs.

Moreover, in Articles 23 and 26 of the respective MOU's there is an integration provision that indicates that the parties negotiated over mandatory subjects in 2012 and waived any right to bargain over matters not covered. PEPRA does address or affect pension benefit formulas under MOU's existing at the time of enactment, except to provide that, effective January 1, 2018, employee contributions, regardless of pension benefit formulas, shall increase to certain higher minimum percentage amounts. Section 7522.30(f) expressly protects against impairment of pre-existing MOU provisions regarding allocation of cost burdens for employee contributions in effect at the time of enactment. PEPRA cannot impute into Article 6 any intent by the parties to require "new members" to reimburse the District 3% of its pension contribution costs. The subject is not addressed in Article 6 and is foreclosed by Articles 23 or 26.

Because the MOU's require only those employees in either the 2.5% at 55 or 2.0% at 60 formula benefit levels to reimburse the District 3% of its annual pension contribution, employees hired under the PEPRA 2% at 62 benefit level should not be obligated to reimburse the District any moneys for any required pension contribution amounts. The Arbitrator should sustain the grievance and order that improperly deducted employee contributions be returned to them with 7% interest in accordance with Civil Code 3287.

POSITION OF THE DISTRICT

The District was required by PEPRA to implement its announced changes in pension benefit levels. Because these changes were the result of explicit, statewide legislation, they superseded any contrary terms in the MOU's. The grievance should therefore be denied.

PEPRA superseded any conflicting language in the MOU's, and required the District to implement a third pension benefits tier. While employee pension benefits are normally considered to be within the scope of representation pursuant to the Meyers-Milias-Brown Act, specific statewide legislation supersedes negotiated collective bargaining agreements unless

the two can be reconciled to avoid a conflict. See *Bagley v. City of Manhattan Beach*, 18 Cal.3d 22 (1976); *Social Services Union v. Bd. of Supervisors*, 222 Cal.App.3d 279. PEPRA is explicit legislation designed to modify public employee pensions and to make the pension system more sustainable. Since its requirement for a new pension tier for "new members" cannot be reconciled with the pension formulae in the existing MOU's, its implementation can be considered outside the scope of representation and not negotiable.

The requirements of PEPRA are mandatory, as reflected in the Legislative Counsel's Digest for the bill. The bill requires the District to "modify its plan . . . to comply with [the] act," establishing "new retirement formulas that could not be exceeded by a public employer offering a defined benefit pension plan, setting the maximum benefit allowable for employees first hired on or after January 1, 2013." It prohibits a public employer from making retirement plan contributions on behalf of employees who become members after January 1, 2013, "based on any portion of compensation that exceeds an amount specific in federal law." It also requires these new members to contribute "at least ½ of the annual actuarially determined normal costs."

Thus, the statute mandated implementation of the 2% @ 62 benefit level for new members. It states that it "shall" apply to all pubic retirement systems and participating employers, all new members, and that new members "may only" participate in plans consistent with the new benefit formulas. The use of the word "shall" throughout these statutes establishes the mandatory nature of the new formula. The absence of a 2% @ 62 tier in the MOU is immaterial in view of the explicit state policy to modify the pension benefits of new public employees, which the District does not have the discretion to disregard.

The Union's reliance on the Winograd Award, in which Arbitrator Winograd held that because PEPRA is silent as to its impact on pension formulas under existing labor agreements, it did not constitute a supersession, is misplaced. The reasoning was erroneous. First, the fact

that there is no reference to existing MOU's in the sections describing the new pension benefit formula does not mean that it should not be applied where there is conflicting language in an MOU. In its circular to employers interpreting the statute, CalPERS noted that PEPRA created new defined benefit formulas for all new members, that the new formula was mandated, and that it would take effect on January 1, 2013.

Second, the existence of exceptions elsewhere in the statute precludes a finding that other, unwritten exceptions were intended. Section 7522.30(a) addresses the equal sharing of normal costs and defines the new standard as employees paying at least 50% of the normal costs and employers not paying any of the required employee contribution. Section 7522.(f) provides an exception in cases where an existing MOU would be impaired. This exception is limited to impairment of those matters addressed in Section 7522.30. That section deals only with the equal sharing of normal costs, and cannot be read as applying to any other subjects such as benefit formulas. The presence of this limited exception is a clear indication that no similar exceptions were intended to apply to other features of the legislation, such as the new benefit formulas. The fact that no exceptions were written for these mandatory terms means that no such exception was intended to apply. The mandatory provisions of the statute must therefore prevail and be applied even in the face of conflicting pension formulae in the MOU's.

Third, the mandatory application of the 2% @ 62 formula has been confirmed by CalPERS. When the District sent the Winograd Award to CalPERS, it received a response indicating that PEPRA supersedes any existing labor agreements and that the District did not have the authority to place new members in a retirement formula other than the PEPRA formula. The CalPERS interpretation is entitled to substantial deference since it is the agency responsible for implementing PEPRA.

The Union's arguments regarding contract impairment pursuant to Section 7522.30(f)

are misplaced. Section 7522.30 deals only with the sharing of normal costs, not with pension formulas. The reference to MOU impairment in subsection (f) is therefore limited to the impairment of provisions related to cost sharing.

Given the provisions of the MOU's, the District properly applied the 3% employer's ARC contribution to new members. Reading as a whole, Article 6 establishes that the parties agreed that all employees in the bargaining unit would pay the 3% employer ARC. The Union maintains that the parties could have agreed to language that any employee at any formula level would pay 3%, instead of separately providing for the 3% contribution for both benefit levels. However, it would have been illogical for the parties to consider such language in negotiations, since at that time the two tiers encompassed all of the employees receiving pension benefits. It is therefore irrelevant that the reference to the 3% contribution is set forth in two separate sentences. The most reasonable interpretation of Article 6 is that all classified employees would be required to pay 3% of the employer's ARC in addition to their designated PERS employee member contribution. The parties' agreement for cost sharing is also in accord with PEPRA, which provides, at section 7522.30 that equal sharing of normal costs "shall be the standard," unless the parties bargain for a higher contribution.

The MOUs' savings clauses do not apply in this case. Since PEPRA has mandatory requirements, any replacement provisions should not be subject to agreement by the parties, since they could not reach an agreement that would be inconsistent with the statute. Even if these changes were in fact subject to negotiation, there was never a request made for such negotiations prior to the grievance. Therefore, based on the foregoing, the District requests that the grievance be denied in full.

OPINION

As the District argues, the language of PEPRA supersedes any collective bargaining

provisions which might be in conflict with it. More specifically, in this particular case, Article 6 of both MOU's provides a pension benefit formula for employees hired after January 1, 2013[7] which is in conflict with the formula required by statue. While the MOU's set out a 2% at 60 formula for such employees, the statute recites in mandatory language that "each public retirement system shall modify its plan . . . to comply with the requirements of this section," and that each system "shall offer only the defined benefit formulas pursuant to Section 7522.20 . . . to new members." The formula defined in 7522.20 is what the parties refer to as "2% at 62," as opposed to the 2% at 60 formula which was mutually agreed upon and incorporated within Article 6. There are no exceptions in the statute for other formulae established through collective bargaining.

It is thus clear that the District had no discretion whether to modify the contractual formula then in effect for employees hired from January 1, 2013 forward, nor to submit the statutory mandate to bargaining. What amounted to a reduction in pension benefits for prospective employees arose by operation of state law. Despite the fact such benefit levels would normally be subject to collective bargaining, the state, by declaring that public employers could not offer a defined benefit plan formula which exceeded a certain maximum, pre-empted the parties' rights and obligations in this regard.

Nor do the Unions contend otherwise. They do not grieve the Employer's implementation of the PEPRA 2% at 62 formula for employees hired after January 1, 2013, as opposed to maintaining the 2% at 60 status quo. Instead, they protest the Employer's imposition on those employees of 3% of an Employer's ARC contribution.

Article 6 of the parties' agreement not only sets forth two specific pension benefit formulae. It also provides that employees eligible for either shall be responsible for a certain

[7]The statute speaks in terms of "members" who begin to participate in the retirement system as of that date rather than employees.

percentage of the Employer's contribution toward pension benefits. Echoing Arbitrator Winograd, these are the Contract's sole references to negotiated pension tiers and employee payments toward the Employer's ARC. In other words, the only way the Contract allows the District to require employees to contribute 3% towards the Employer's portion of pension costs is if they are either in the 2.5% at 55 or the 2% at 60 pension tier.

There is nothing in PEPRA which mandates that employees, new or otherwise, defray or share in employer pension costs. Pension cost sharing is discussed in section 7522.30. That section sets a standard of "equal sharing of normal costs between public employers and public employees" where "employees pay at least 50 percent of normal costs" while "employers not pay any of the required employee contribution."

More importantly for present purposes, PEPRA contains a significant restriction on the Employer's ability to adjust employee contributions above the 50% standard. Under 7522.30 (e), employee contributions of more than one-half of the normal cost rate are allowable only "if the increase has been agreed to through the collective bargaining process." Absent a collectively bargained MOU, "the employer shall not increase an employee contribution rate." Nor shall the employer "use impasse procedures to increase an employee contribution rate above the rate required by this section." (Gov't Code §7522.30(e) 2 and 3).

Thus, the statute explicitly declares that employee contributions to pension costs may not exceed 50% of normal costs without an agreed-upon collectively bargained provision which permits such an increase. In this situation, the requirement that employees subject to the PEPRA-mandated 2% at 62 formula pay an additional 3% of the Employer's ARC was not arrived at "through the collective bargaining process," but was unilaterally imposed by the District in derogation not only of the statute but also of the Contract's Recognition and Full Agreement Articles. Under the MOU, the only employee groups who are required to furnish 3%

of the Employer's ARC are those in its two designated pension formula categories. For the Arbitrator to affirm the District's extension of this requirement to a third group not referred to in the MOU would be, as the Union suggests, contrary to the Contract's limitation on arbitral authority not to "add to, . . ., or otherwise modify the terms and conditions of this MOU."

The District's efforts to impute the Unions' intent to extend the additional 3% contribution to employees in the 2% at 62 category are supported neither by PEPRA nor by the language of the respective MOU's. As indicated, PEPRA contemplates cost sharing over and above the 50% level only where the increase has been agreed to in collective bargaining. There was no such agreement here. New employees were obliged to accept a pension benefit which was inferior to those offered to existing employees not as result of collective bargaining, but because of a statutory mandate. While the parties may have intended to apply the 3% to all employees who existed at the time the Contract was executed, that language cannot be interpreted to mean that they agreed to apply it to all groups, present and future, particularly where the creation of an additional group may have been wholly unforeseen. Although the District asserts that the there was no indication from the Contract language that either party wished to exclude a given class of employees from the 3% obligation, there was likewise no indication that either party wanted to include any more classes either.

The District contends that the most reasonable interpretation of Article 6 is that all employees would be required to pay the 3% contribution even if the establishment of an additional group was not contemplated by the parties. This argument fails to account for the fact that the PEPRA-imposed benefit tier was of lesser value than those previously offered, and as such, presumably less expensive for the Employer. The savings thus achieved might therefore justify excluding this group from the 3% obligation, particularly within a collective bargaining context. The District's position also ignores the possibility that the Union may have agreed to

the 3% contribution on behalf of this new group of employees as the result of a compromise in exchange for an offsetting inducement offered by the District within the normal give-and-take of Contract negotiations.

The CalPers December 3 circular to the District is particularly instructive on this point. The circular, in reference to certain CalPERS contracts where employees pay contributions in addition to the member rate, states that "under existing law, such employer cost sharing contract amendments were required to be tied to a benefit improvement." There was accordingly a negotiated inducement for the Unions' prior acceptance of the 3% contribution. With regard to the January, 2013 formula modifications, the 3% contribution was tied not to an improvement, but to a reduction in benefits. Rather than interpreting Article 6 as imposing uniformity among employees with regard to cost sharing, as the Employer advocates, the circular recognizes that "under the new law, cost sharing agreements may differ by bargaining unit or for classifications of employees subject to different benefit levels as agreed to in an MOU."

Finally, although the District asserts that the Savings Clause in Article 23 has no bearing on this grievance, the fact that the 2% at 60 tier was rendered invalid by law placed an obligation on the parties to enter into negotiations for a replacement upon request. The burden of requesting negotiations for a proposed replacement which would add, as required by statute, an agreement on employee contributions above "normal costs," was decidedly upon the District. Its failure to do so was fatal to its position vis-a-vis that contribution, notwithstanding that there was no meet and confer requirement before instituting the change in the benefit formula itself.

AWARD

The grievance is sustained. Neither the MOU's nor PEPRA require employees hired on or after January 1, 2013 to contribute 3 percent of their pensionable compensation towards the District's costs of the employer contribution towards pension benefits.

The District is ordered to cease and desist from requiring such contributions from these employees and deducting them from their compensation. The employees are to be reimbursed and made whole for any such contributions made to date, together with interest at the statutory rate.

The Arbitrator retains jurisdiction over any questions arising from the interpretation or implementation of this Award.

Dated: April 21, 2014

MATTHEW GOLDBERG
Arbitrator