



# Stone Busailah, LLP

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## **SUPREME COURT RULES “AIR TIME” OPTION IS NOT A PROTECTED RIGHT**

*Cal Fire Local 2881 et al.,*

v.

*California Public Employees’ Retirement System (2019)*

*By Maurice E. Sinsley, Esq.*

### **1. “Air Time” The Additional Retirement Service Credit (ARS)**

Prior to 2003, public employees who had performed military service prior to joining the CalPERS system were given the opportunity to increase their service credit under CalPERS by purchasing their "military time." In 2003, the Legislature expanded the option to include "nonqualified" service, allowing employees to purchase up to 5-years of additional retirement service credit or "air time", that served as ordinary service credit on their retirement.

However, in 2012 the Legislature eliminated the air-time option with the passage of the Public Employees Pension Reform Act (PEPRA).

Employee associations opposed the change and one group of state employees filed a lawsuit contending the air time option was a vested right and protected by the Constitution.

### **2. The Supreme Court Decision**

This week the California Supreme Court held that because the Legislature did not intend to create a contractual right to purchase air time, the Legislature did not violate any protected pension rights when it eliminated the option to purchase air time after the end of 2012.

In an extensive analysis of the protections afforded to public employment benefits under contract law, the Court found that while the "vested

**“Defending Those Who Protect Others”**

rights”<sup>1</sup> doctrine has long been applied to protect terms and conditions of public employment from being impaired, the doctrine only applies where the Legislature clearly intended to create a contractual right through expressed terms.

While the Court also affirmed that some public pension benefits may create an implied contractual right, it emphasized that such rights are not guaranteed. The Court held that while pension benefits that constitute an element of compensation for work the employee has already performed are usually protected, the air time option required only a minimum time of service and payment of the fee.

As such, the air time benefit was not an element of compensation for the work already performed by the employee.

In this way, the Court held that the air time option was no different from other optional benefits such as health, life or disability insurance.

### **3. *ARS Credit Purchased Before 2013 Survives***

The good news here is that the Court confirmed that employees who took advantage of the opportunity to purchase air time before 2013 are not effected by PEPRA and their investment is safe.

### **4. *The Court Confirms the ARS Ban Applies to All Public Retirement Systems***

Although this case was about the removal of the air time option from the CalPERS pension

program, the Court held that this PEPRA provision applies to all public retirement systems. This decision is also important because of the Court's extensive analysis of how the terms and conditions of public employee employment are governed by express contracts and subject to change based on the actions of the Legislature.

### **5. *The California Rule Survives***

The long history of California Court decisions providing favorable constitutional protection to public pension rights has come to be known as the “California Rule.” The State, and many of the organizations filing amicus briefs urged the Court to use this case to re-examine and modify the rule in light of the recent emphasis on unfunded liabilities. Such vested rights, they reasoned, were judge made law that must be clarified as the economic circumstances change.

However, the Court emphasized that the questions before it were limited to whether the air time option was a contractual right, and if so, was that right impaired by PEPRA. Having decided both questions in the negative, the Court found no reason to express its opinion regarding the “California Rule.”

Stay Safe!

*Maurice E. Sinsley* is an associate attorney with Stone Busailah, LLP., who has 30 years of fire service experience in Southern California.

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<sup>1</sup>The Court was cautious to define that using the term “vested” to describe satisfying the minimum service requirement to receive a pension is not the same as having a “vested” right.