U.S. Department of Labor

Office of Labor-Management Standards
Washington, D.C. 20210

September 30, 2013

Leslie Rogers, Regional Administrator
Federal Transit Administration, Region IX
201 Mission Street, Suite 2210
San Francisco, California 94105

Re: FTA Application
Santa Clara Valley Transportation Authority
JARC Operating Assistance, Capitalized Preventive Maintenance, Non-Fixed Route ADA Paratransit Service; Rehab/Renovate Bus Stops and Access, Force Account, Project Administration
CA-90-Z051

Dear Mr. Rogers:

This is in reply to the request from your office that we review the above-captioned application for a grant under section 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1609(c) (1964), now codified as part of the Federal Transit Act, 49 U.S.C. § 5333(b).

This is the Department of Labor's (Department or DOL) final determination of Santa Clara Valley Transportation Authority's (VTA's) ability to preserve and continue, consistent with section 13(c), the pension benefits and collective bargaining rights of its employees represented by the Amalgamated Transit Union (ATU) Local 265 (ATU or Union).

Federal Transit law requires as a condition of financial assistance that the interests of employees affected by the assistance be protected under arrangements the Secretary of Labor certifies are fair and equitable, 49 U.S.C. § 5333(b)(1). The law specifically provides:

Arrangements . . . shall include such provisions as may be necessary for

(1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
(2) the continuation of collective bargaining rights;
(3) the protection of individual employees against a worsening of their positions with respect to their employment;
(4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and
(5) paid training or retraining programs.

49 U.S.C. § 5333(b)(2).[1] These arrangements are commonly referred to as section 13(c) agreements because the requirement for such arrangements originated in section 13(c) of the Urban Mass Transportation Act of 1964, 78 Stat. 307. Because the Secretary of Labor's certification is a "condition" for the award of a grant, the Secretary must certify the protective arrangements before the Department of Transportation can award funds to grantees. 73 Fed. Reg. 47,046, 47,047 (Aug. 13, 2008) (preamble to current DOL Guidelines).

In exercising the Department's discretion to ensure fair and equitable protective arrangements in compliance with section 13(c), the Department has reviewed California's Public Employee Pension Reform Act (PEPRA), Assembly Bill 340, (Furutani), Stats. 2012, Chapter 296, West's Ann.Cal.Gov.Code § 7522, et seq., in consultation with the State of California's Office of the Governor, and the State's Labor and Workforce Development Agency with respect to the precise contours of the statute.[2] The Department has also reviewed the supplemental materials concerning the provisions of the parties' collective bargaining agreements and PEPRA's effects to determine the effects of PEPRA on rights protected by section 13(c). We have concluded that PEPRA makes significant changes to pension benefits that are inconsistent with section 13(c)(1)'s mandate to preserve pension benefits under existing collective bargaining agreements and section 13(c)(2)'s mandate to ensure continuation of collective bargaining rights. Thus, PEPRA precludes the Department from providing the requisite certification to the Federal Transit Authority.[3]

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[1] Note the text of the statute was codified from this earlier version in 1994 to separate the fourth assurance into two separate and lettered paragraphs.

[2] Along with the Department's independent review of PEPRA, attorneys from these California state government offices provided the Department with a useful summary of the PEPRA provisions, which the Department relied upon.

[3] This denial of certification is issued without prejudice to VTA's right to seek or obtain certification under changed circumstances.

Background – State Law Change to Collective Bargaining Rights

On September 12, 2012, Governor Edmund G. Brown, Jr. signed into California law PEPRA and related pension reform changes. These statutory provisions became effective on January 1, 2013. PEPRA applies to most California transit systems.[4] PEPRA's practical and legal effect on the employees of transit agencies depends on each union's separately negotiated collective bargaining agreement and the type of pension plan in which the employees participate. [5] In general, PEPRA is immediately effective for employees hired on or after January 1, 2013. These employees are termed "new" employees or, when referring to their participation in any type of a public retirement system or plan, "new" members. PEPRA Article 4, Section 7522.04(e) and (f). For the purpose of this determination, DOL adopts the term "classic," as used by the California Public Employee Retirement System, for all those employees who do not meet the definition of "new." PEPRA introduces a two-tier pension benefit system for these two classes of employees. *Id.*

PEPRA ultimately determines the pension contributions and every significant aspect of the pension benefit calculation for "new" employees. It controls the benefit formula (i.e., percent multiplier of final compensation at various years of service), the definition of compensation used to determine the pension benefit ("pensionable compensation"), and the minimum age for receipt of a pension; it imposes a cap on the amount of final compensation that can be used in the pension benefit determination, and requires "new" employees to pay 50 percent of normal pension costs. Additionally, "new" employees are not eligible to participate in supplemental defined benefit plans. PEPRA Article 4, Sections 7522.10, 7522.20, 7522.32, 7522.34(c), 7522.18(c).

PEPRA also affects the rights of "classic" employees. As of January 1, 2018, PEPRA authorizes employers to set "classic" employees' contribution level at 50 percent of the normal cost of pension benefits after bargaining to impasse, restricted only by a cap set forth in Section 31631.5(a)(1).

Procedural Background

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[4] Those operated by charter cities and charter counties not participating in the California Public Employees Retirement System (CalPERS) or the 1937 Act County Requirement System and those operated by the University of California are not affected. In addition, transit systems that use private contractors for the operation of all service and vehicle maintenance, as well as other supporting functions, are not affected. PEPRA Article 4, Section 7522.02(a)(2).

[5] PEPRA's effect on employees of transit agencies also depends on whether the pension plan falls under either CalPERS, the 1937 County Act Systems, or can be defined as an "independent" plan, as is the case with the VTA-ATU Local 265 plan.

The section 13(c) process begins when the DOL receives a copy of an application for Federal assistance along with a request for certification of employee protective arrangements from the Department of Transportation. Upon receipt of an application involving employees represented by a labor organization, DOL refers a copy of the application to that organization and notifies the applicant of the referral. After referral and notice, DOL recommends the terms and conditions that are to serve as the basis for certification. The DOL's implementing Guidelines (Guidelines) reflect the practice that the previously certified protective arrangement is appropriate for application to the new grant. Therefore, DOL's referral will propose certification based on those terms and conditions. 29 C.F.R. § 215.3(b)(2).

Under DOL's implementing Guidelines, applicants and unions/employees may file "objections" to the terms of a proposed certification within fifteen days. DOL must then determine whether the objections are "sufficient," i.e., "raise[] material issues that may require alternative employee protections" or "concern[] changes in legal or factual circumstances that may materially affect the rights or interests of employees." 29 C.F.R. § 215.3(d). More specifically, the Guidelines provide that the parties may "submit objections, if any, to the referred terms," while, at the same time, the parties are "encouraged" to arrive at "a mutually agreeable solution to objections any party has to the terms and conditions of referral." 29 C.F.R. § 215.3(d)(1).

Here, the ATU objected to the proposed terms for employee protection certification contained in the Department's referral for the above-referenced grant on August 20, 2013. The union stated that PEPRA appears to have removed mandatory and traditional subjects of collective bargaining from the consideration of the parties and prevents the continuation of collective bargaining rights of employees.[6] The union also stated that among other mandates, PEPRA will impermissibly require participating employers to unilaterally implement changes to retirement benefits without first bargaining with their employee representatives by:

- Raising the minimum retirement ages;
- Reducing pension benefits for new public employees;
- Imposing new formulas for calculating pensions for new public employees;
- Imposing a definition of "final compensation";
- Fixing the vesting schedule, and
- Adjusting the compensation cap annually and requiring certain contributions from employees to equal one-half of the normal costs of the plan.

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[6] In this submission, the union quoted language from the Department's written responses to objections in proceedings concerning grants CA-90-Y942, CA-90-Z022, CA-95-X042, and CA-03-0806.

Letter from Jessica M. Chu to Michael J. Hayes (August 20, 2013), "Objections to Referral Terms".

The Department reviewed the union's objections concerning PEPRA and found the objections sufficient. On August 30, 2013, the Department communicated to the parties that PEPRA appeared to have removed mandatory and traditional subjects of collective bargaining from the consideration of the parties and to have prevented the continuation of collective bargaining rights of employees. 49 U.S.C. § 5333(B)(2)(b). The Department determined that PEPRA constitutes a change in legal or factual circumstances that may materially affect the rights or interests of employees represented by the unions. See 29 C.F.R. § 215.3(d)(3)(ii).

The parties were directed to brief specified issues under a Briefing Schedule provided by the Department on August 30, 2013.[7] The issues appear as an appendix to this decision. The Department determined and notified the parties at that time that an interim certification of the grants would not be issued because PEPRA might present circumstances inconsistent with section 13(c). The union submitted its brief on September 9, 2013 and VTA submitted its brief on September 11, 2013.

VTA Pension Benefits

The collective bargaining agreement (CBA) and the Santa Clara Valley Transportation Authority - Amalgamated Transit Union, Local 265 Pension Plan (Pension Plan or Plan) set forth the pension arrangements between VTA and ATU. *ATU Brief ("Br.")*, Ex. 1 (CBA Excerpt) and 2 (Pension Plan). The Pension Plan is funded by VTA contributions, and no employee contribution is required. *VTA Br.,* p. 2; *ATU Br.,* p. 3. and Ex. 3 (Introduction and General Overview of the Pension Trust and Pension Contract) p. ii. The VTA pays the total cost of the pension plan. *Id.*

The Pension Plan caps pensionable compensation at the IRS limit ($255,000 for 2013). *Pension Plan,* Sect. 1.17.2; IRS Code Sect. 401(a)(17)(b). Under the Pension Plan, members may retire after 15 years of service at age 55; or 10

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[7] The Department did not send the parties to negotiations. In its August 30, 2013 letter, the Department wrote, "In several other situations the Department convened negotiations and/or discussions between objecting union(s) and the affected transit agency to seek a mutually acceptable resolution of the issues concerning the preservation of pension rights and benefits and the continuation of collective bargaining rights in the face of PEPRA. Although the parties cooperated with each other and the Department and devoted considerable time and effort to find solutions, such was not fruitful." Consequently, as prior proceedings have indicated that PEPRA's broad scope leaves few or no opportunities for a negotiated solution, the Department found that negotiations were not "appropriate" in this instance. 29 C.F.R. 215.2(d)(6)

years of service at age 65; or five years of service at age 65. *Pension Plan,* Sect. 3.1. The formula under the Pension Plan provides for pension payments that start at 2.0 percent of final compensation at 55 to 2.4 percent at 65. *Pension Plan*, p. 43, Table 1. Under a one-time retirement incentive, employees were permitted to retire after attaining age 50 and completing 25 years of service. *Pension Plan*, Sect. 3.1.4. The Plan thus, at least at one time, allowed for retroactive pension benefits enhancements to encourage early retirement. *Id.*

In calculating pensionable compensation, the Pension Plan permits the inclusion of payouts of overtime, sick leave, and vacation allowance and any other paid time prior to retirement. *Pension Plan*, Sect. 1.17. Pensionable compensation is based on the employee's highest paid three years, whether consecutive or not. *Pension Plan*, Sect. 1.03.2. The Pension Plan does not offer the opportunity to purchase nonqualified service credit.

Position of VTA

The Department has carefully reviewed VTA's brief. The Authority in response to the Department's briefing order provided relevant and informative data with regard to the collective bargaining agreement and the Pension Plan. The brief did not discuss the interplay of PEPRA with 13(c) or draw conclusions as to whether certification was consistent with the statute or judicial case law. VTA did make the point that the entirety of PEPRA may not apply in light of current legislative developments.[8]

Position of the ATU

The Department has carefully reviewed the Union's objections and brief, along with its attached exhibits. The Union asserts that PEPRA violates section 13(c)(1) by making substantial unilateral changes to pension benefits under the current collective bargaining agreement and violates section 13(c)(2) by significantly restricting the scope of bargaining over pensions. The union states:

> [PEPRA] has thus stripped ATU and other unions representing transit employees of the right to negotiate over any of these critical aspects of their pension benefits. Indeed, the parties can no longer negotiate the benefit formula, definition of final compensation, applicability of the formula to past and/or future service, the employer pick-up, or other benefit features, effectively putting an

[8] The California Legislature passed legislation conditionally exempting transit employees from PEPRA. Assembly Bill 1223 (2013). This legislation has yet to be signed into law by the Governor.

> end to collective bargaining relative to the core subject of retirement benefits.

Letter from Jessica M. Chu to Michael J. Hayes (August 20, 2013), "Objections to Referral Terms" at pg. 3.

DETERMINATION

The Department, in Sacramento Regional Transit District, CA-03-0806-03 and CA-03-0806-04 (September 4, 2013)(copy enclosed), discussed at length the legal arguments surrounding Section 13(c) and PEPRA in the context of an independent retirement plan similar to that offered by VTA. We have considered those issues, where pertinent, in the context of this grant application, and we adopt herein the analysis and conclusions of that determination where applicable. See Sacramento Regional Transit District, CA-03-0806-03 and CA-03-0806-04 (September 4, 2013) at pp. 7-13.

Applying that analysis to the instant matter, the Department has determined that PEPRA's effect on the collective bargaining rights of transit workers covered by the VTA-ATU Local 265 agreement reveals an impermissible conflict with sections 13(c)(1) and 13(c)(2). PEPRA's imposition of a two-tier structure on the collective bargaining agreement primarily affects bargaining unit employees hired after January 1, 2013. PEPRA both reduces existing benefit levels for such "new" employees (thus violating section 13(c)(1)'s "preservation of benefits" requirement), and diminishes a union's ability to bargain over benefits *and* contributions for "new" employees in the future (thus violating section 13(c)(2)'s "continuation of collective bargaining rights" requirement).

PEPRA has or will soon have an impact on many specific aspects of negotiated pension plan benefits for VTA's employees. The impacts discussed below are intended to be illustrative, not exhaustive.

PEPRA has had an immediate effect on VTA "new" employees' contribution amounts. Under the collective bargaining agreement in place, VTA pays the total cost of the pension plan. *VTA Br.* p. 2; *ATU Br.*, p. 3. *ATU Br., Exh. 3* (Introduction and General Overview of the Pension Trust and Pension Contract) p. ii. In contrast, PEPRA, Article 4, Section 7522.30 requires that "new" employees pay at least 50 percent of the normal pension plan costs, and employers are prohibited from paying any of the required employee contributions.[9] Thus, as a direct result of PEPRA, "new" VTA employees are

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[9] The only exception is if an existing agreement contains a contrary provision and would thereby be "impaired." However, the exception is effective only until the agreement is amended, extended, renewed, or expired. *See* PEPRA, Section 7522.30(f).

required to pay 50 percent of the pension plan costs, an amount the collective bargaining agreement does not require them to pay.

PEPRA affects the pension benefits received by "new" employees upon retirement. When asked to compare the monthly pension benefits levels of the negotiated pension plan with those of PEPRA, the parties' submissions indicate agreement of the following terms:

Age at Retirement	Benefit Factor	15 years of service	30 years of service
Pension Plan: Age 55	2%	$1,500	$3,000
PEPRA: Age 55	1.3%	$975	$1,950
Pension Plan: Age 62	2.28%	$1,710	$3,420
PEPRA: Age 62	2%	$1,500	$3,000
Pension Plan: Age 67	2.4%	$1,800	$3,600
PEPRA: Age 67	2.5%	$1,875	$3,750

In addition, ATU asserts and VTA has not disputed the following scenario, as an example of PEPRA's effect:

- A 55 year old employee with 30 years of service could retire under the CBA with 60% of his or her final average salary. Under PEPRA, the employee would receive 39% of his or her final average salary.

See *Pension Plan*, Table 1; PEPRA, Section 7522.20(a).

In addition to changing the percent multiplier, PEPRA also affects the calculation of the pension benefit in other ways, all of which have the effect of lowering the pension benefits of "new" employees. The Pension Plan permits the inclusion in pensionable compensation of payouts of overtime, sick leave, and vacation allowance and any other paid time prior to retirement. *Pension Plan,* Sect. 1.17. PEPRA bars all of these compensation categories from inclusion in pensionable compensation. PEPRA Sections 7522.34(a) and 7522.34(c). In so doing, PEPRA supplants the more advantageous pensionable compensation calculation previously negotiated by the parties. Likewise, PEPRA imposes a cap on pensionable compensation of $113,100, indexed to annual changes in the cost of living. PEPRA, Section 7522.10. In the negotiated pension plan, pensionable compensation is more generous; it is capped at the IRS limit ($255,000 for 2013). *Pension Plan,* Sect. 1.17; IRS Code Sect. 401(a)(17)(b). PEPRA also establishes a five-year vesting schedule. PEPRA, Section 7522.20 ATU asserts that the longer vesting period permitted higher level of benefits for long term employees and that the change eliminates

ATU's ability to "bargain the issue of plan cost versus the scope of the benefit." *ATU Br.*, p. 2.

PEPRA also generally affects the rights of all employees under the negotiated pension plan. As of January 1, 2013, PEPRA prohibits employees from purchasing service credit for years not worked for purposes of pension entitlement ("airtime" or nonqualified pension service credit).[10] PEPRA, Art. 4, Section 7522.46. The Pension Plan and the CBA are silent on airtime rights, and PEPRA removes the union's ability to negotiate for such a right. Additionally, except for annual cost-of-living adjustments, PEPRA Section 7522.44 prohibits benefit enhancements for service performed prior to the operative date of the enhancement. In contrast, and although there is no early retirement opportunity currently available, the Pension Plan previously allowed for retroactive pension benefits enhancements to foster early retirement. *Pension Plan,* 3.1.4. Finally, PEPRA prevents VTA from creating new supplemental defined benefit plans or certain replacement benefit plans for "new" *or* "classic" employees. PEPRA, Section 7522.18; Section 7522.43.

CONCLUSION

There is little dispute over the impact of PEPRA on the existing rights of employees covered by the VTA-ATU Local 265 collective bargaining agreement and on the scope of collective bargaining. Congress incorporated in section 13(c) the commonly-understood meaning of collective bargaining that requires, at a minimum, good faith negotiation to the point of impasse, if necessary, over wages, hours, and other terms and conditions of employment. *Amalgamated Transit Union v. Donovan*, 767 F.2d 939, 949 (D.C. Cir. 1985). Meaningful collective bargaining does not exist when a state mandates changes in what the parties have previously negotiated, dictates results, or removes relevant issues from consideration.

It is correct that PEPRA allows for negotiation over some aspects of pension benefits. However, the Department has concluded that PEPRA significantly reduces pension entitlements under the existing collective bargaining agreements for employees hired after January 1, 2013 and precludes the Union from negotiating many aspects of their pension plans, including the employee contribution rate, in subsequent agreements.
Sections 13(c)(1) and (2) require the preservation of pension rights and benefits and the continuation of collective bargaining rights. These rights are prerequisites for federal assistance under section 5333(b) of the Transit Act. Under PEPRA, VTA cannot comply with the requirements of the Act.

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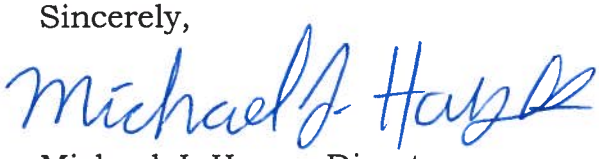
[10] Air time refers to the purchase of service credit for purposes of service and benefit calculation. Prior to PEPRA some retirement systems offered members the opportunity to purchase up to five years of service credit.

Therefore, the effects of PEPRA render it legally impermissible, under the current circumstances, for the Department to certify fair and equitable employee protective conditions for grants to VTA.

Sincerely,



Michael J. Hayes, Director
Office of Labor Management Standards

Enclosure

cc: Scheryl Portee/FTA
Jessica M. Chu/ATU
Benjamin Lunch/Neyhart, Anderson, Flynn & Grosboll
Jeffery Ballou/SCVTA
Mary Kay Henry/SEIU
Wesley Toy/TEAE
Bonnie Morr, c/o Cara McGint/UTU
David L. Neigus/IAM
Paul Knupp/Guerrieri, Clayman, Bartos & Parcelli
Ray Cobb/IBEW
Gregory Junemann/IFPTE
Richard Edelman/O'Donnell, Schwartz & Anderson
Lee Saunders, c/o William Wilkinson/AFSCME
George Popyack/AFSCME Local 101
Greg Savage/BART Police Managers Association
Mike Hotton/BART Police Officers Association
Sonia Bannister/M-S EA
Geoffrey McCloud, President/IRSA
Walter Wise/IBSOIW

APPENDIX
PEPRA Objection Questions

Provide the start date and expiration date of your collective bargaining agreement, including any extensions, as well as the expiration date of your pension agreement.

For each negotiated pension plan, describe its organization (CalPERS, 1937 County Act, Independent System, other); type (defined benefit, defined contribution, jointly administered "Taft-Hartley," deferred compensation/savings, primary or supplemental); and participation (union employees, all employees, multi-employer, etc.).

Describe, separately for "new employees" (those hired on or after January 1, 2013) and "classic employees" (those hired before January 1, 2013), all pension benefit requirements that will be affected by PEPRA. Be specific in terms of participation in the plan, vesting schedule, employee contribution levels, pensionable compensation, minimum retirement age, minimum years of service, special circumstance retirement (early, disability, x-years-and-out), pension benefit formulas, and any other requirement or computation for a pension benefit of any kind.

Describe whether PEPRA will require the negotiation or unilateral imposition of a new level of pension contributions by classic employees on or before January
1, 2018.

Compare the pension benefit levels of each negotiated pension plan with those of PEPRA. Be specific and show by list or chart dollar amounts of benefits at threshold retirement ages and years of service (those points at which the benefit level would change under the pension plan). Assume a final compensation figure of $5,000 per month, for sake of illustration.

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