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
Golden Gate Bridge, Highway and Transportation District
Purchase 7 Paratransit Vans, Hardware/Software/Services for Advanced Communications & Information System
CA-90-Y963

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's final determination on the issue of Golden Gate Bridge, Highway and Transportation District's (GGBH&TD) ability to preserve and continue, consistent with section 13(c), the pension benefits and collective bargaining rights of its employees represented by the International Association of Machinists and Aerospace Workers (IAM or the 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 Department 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, Assembly Bill 340, (Furutani), Stats. 2012, Chapter 296 (PEPRA), in consultation with the State of California's Office of the Governor, and the Labor and Workforce Development Agency with respect to the precise contours of the statute.[2] The Department has also reviewed the relevant collective bargaining agreements, pension plans, and the parties' briefs and 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]

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

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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, upon which the Department relied.
[3] This denial of certification is issued without prejudice to GGBH&TD's right to seek or obtain certification under changed circumstances.

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, the Department 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 – The Parties' Negotiations

The section 13(c) process begins when the Department 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, the Department refers a copy of the application to that organization and notifies the applicant of the referral. After referral and notice, the Department recommends the terms and conditions to serve as the basis for

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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 the 1937 County Act Systems, can be defined as an "independent" plan, or as is the case with the IAM-GGBH&TD is a CalPERS plan.

certification. The Department's implementing Guidelines (Guidelines) establish a practice that the previously certified protective arrangement is appropriate for application to the new grant. Therefore, the Department's referral will propose certification based on those terms and conditions. 29 C.F.R. § 215.3(b)(2).

Under the Department's implementing Guidelines, applicants and unions/employees may file "objections" to the terms of a proposed certification within fifteen days. The Department 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 IAM objected to the proposed terms for employee protection certification contained in the Department's referral for the above referenced grant on June 28, 2013.[6] The IAM objected that PEPRA "interferes with GGBH&TD's duty to preserve the benefits and collective bargaining rights of employees represented by IAM." *IAM Objections.*

The Department reviewed the IAM'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 affected the continuation of the 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. 29 C.F.R. § 215.3(d)(3)(ii).

On August 30, 2013, the Department directed the parties to respond to certain specified questions in the Briefing Schedule. The questions sought information concerning the details of the IAM-GGBH&TD pension plan and PEPRA's effect on plan.[7] The Department explained its reasoning for proceeding directly to briefing questions:

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[6] The Amalgamated Transit Union (ATU) did not file an objection to the Department's referral of protective conditions for this grant. However, the ATU did file a timely objection two months later on GGBHTD grant number CA-95-X252. The ATU's objection will be considered by the Department in conjunction with that grant in a subsequent determination.

[7] The Department has already considered legal argument with respect to the 13(c) standards and PEPRA in its September 4, 2013 decision not to certify the requested grant CA-03-0806-03 and CA-03-0806-04 for Sacramento Regional Transit District.

> 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. Therefore, the Department believes that the most practical means of concluding this matter is to request information from the parties necessary for a final determination of the issues at the transit agency.

The Department's directive to proceed directly to briefing questions is fully permissible under the Department's Guidelines.[8]

Both IAM and GGBH&TD submitted briefs and exhibits[9] in support of their positions on September 10, 2013. As set forth more fully below, IAM asserts that historically, IAM-represented employees have been able to bargain fully over the terms of their defined benefit pension plan. IAM asserts that the Department cannot certify that GGBH&TD has met the requirements of the Act when the Department has already determined that PEPRA's significant changes to pension benefits are inconsistent with section 13(c). See *IAM Br.*, p. 8 quoting DOL Determination Regarding Sacramento Regional Transit District (September 4, 2013). GGBH&TD, on the other hand, does not in any appreciable way distinguish its circumstance from those discussed in the Department's September 4, 2013 determination and instead asserts that PEPRA presents no 13(c) conflict because PEPRA does not impair collective bargaining rights of 13(c) protected employees. *GGBH&TD Br.*, p. 2. GGBH&TD asserts that "while a transit agency ultimately may not agree to provide new alternative benefits, PEPRA does not stop consideration of such changes as part of the give and take of the collective bargaining process." *Id.*

<u>GGBH&TD Pension Benefits – CalPERS</u>

California Public Employee Retirement System (CalPERS) is a defined benefit retirement plan which provides benefits that are calculated using a "defined" formula. GGBH&TD employees participate in one of CalPERS' "miscellaneous" member plans.[10] Retirement benefits are calculated using a member's years of

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[8] The Department notes that GGBH&TD specifically stated in its response to the Briefing Schedule that it would "indicate and preserve [GGBH&TD's] objection for [DOL] not following regulatory process," Particularly the lack of negotiation proposal from the IAM. *GGBH&TD's Br.*, p. 1.

[9] Referred to as *IAM Br.* and *GGBHTD Br.*

[10] "Miscellaneous" plans refer to plans provided to "those employed by the State and universities who are not involved in law enforcement, fire suppression, the protection of public safety, or employed in a position designated by law as industrial, patrol, peace officer/firefighter, or safety." "What You Need to Know About Your CalPERS State and

service credit, age at retirement, and final compensation (average salary for a defined period of employment). CalPERS offers a "variety of retirement formulas that are determined by the member's employer...; occupation...; and the specific provisions in the contract between CalPERS and the employer."[11]

According to CalPERS, participating "public agencies may include various contract options in their retirement plan or plans."[12] While a "minimum level of benefits" is statutorily required, employers "can amend their contract to enhance the minimum benefits, or provide a range of additional optional benefits to employees." See n. 12. All employers when initiating a contract must choose (1) the service retirement formula they will offer; (2) 1 year or 3 year final compensation period; (3) the maximum cost of living adjustment; (4) the amount of lump sum death benefit for retired members; (5) the level of benefits to be provided to survivors of employees not covered by Social Security; and (6) whether to allow industrial disability retirement for miscellaneous members. *Id.* Among the optional benefits CalPERS makes available to miscellaneous members are the following retirement formulas:[13] 1.5% at 65; 2% at 55; 2.5% at 55; 2.7% at 55; 2% at 60; and 3% at 60. See n. 12.

Prior to PEPRA, employees received either a "2.5% at 55" or a "2% at age 60" pension. Employees hired after December 1, 2012 through the expiration of the Memoranda of Understanding (MOU) (see below) on June 30, 2014, would receive a "2% at 60" formula. Before PEPRA, IAM-represented employees were eligible for early retirement at age 50. *IAM Br.* p. 5. Final compensation was based on the employee's final year of employment. *Id.*

Position of IAM

IAM states that GGBH&TD and IAM have been parties to three MOUs covering approximately 80 employees. *IAM Br.* P. 2. The pension benefits of IAM-represented employees are outlined in each MOU.

IAM asserts that GGBH&TD has contracted with CalPERS to provide pension benefits to IAM employees. IAM highlights that the significant optional

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Industrial Miscellaneous Benefits", http://www.calpers.ca.gov/eip-docs/about/pubs/member/your-benefits-your-health-state-misc-inds-benef.pdf, p.3.

[11] http://www.calpers.ca.gov/index.jsp?bc=/about/benefits-overview/retirement/retirement-benefits.xml. GGBH&TD employees participate in one of CalPERS' "miscellaneous" member plans.

[12] http://www.calpers.ca.gov/eip-docs/employer/cir-ltrs/2011/200-039-11-attach.pdf. (9/19/13).

[13] "2% at 55" means an annual pension beginning at age 55 equal to 2% of the employee's final compensation multiplied by his or her years of service, with actuarial adjustments for earlier or later retirement dates. http://www.calpers.ca.gov/eip-docs/employer/cir-ltrs/2011/200-039-11-attach.pdf.

benefits that it has negotiated with GGBH&TD are the benefit formula, the early retirement age and final compensation. *IAM Br.*, p. 3. IAM further explains that the benefit formula is 2.5% @ 55 for employees hired before December 1, 2012 and a 2% @ 60 for employees hired after December 1, 2012. *Id.* IAM also asserts that final compensation under both benefit levels is defined as the highest average pay rate and special compensation, if any, during any consecutive one-year period. *Id.*

IAM states that PEPRA also affects "classic" employees because PEPRA prohibits GGHB&TD from "offering a benefit replacement or enhancement based on past service" and has thus "eliminated the [union's] ability to bargain over early retirement or other incentives to effectuate changes in the unit's size or age demographics..." *IAM Br.* p. 5. IAM also states that PEPRA "prohibits GGBH&TD from bargaining over purchase of pension service credits for non-working time while eliminating substantially all non-working time from pensionable compensation." Finally, IAM asserts that PEPRA further affects "classic" employees by implementing a 180-day waiting period for retirees who wish to return to work for a CalPERS employer. *Id.*

Finally, IAM notes that the current MOU expires on June 30, 2014, at which time, an employer who has bargained to impasse and completed impasse procedures may unilaterally require "classic" members to pay up to 50% of the normal cost of their pension benefit. *IAM Br.*, p. 6.

Position of GGBH&TD

GGBH&TD states that IAM represents three bargaining units at three different divisions of GGBH&TD – the bus division, the ferry division and the bridge division. Each unit has its own MOU, all of which were in effect prior to PEPRA and which do not expire until June 20, 2014 and June 30, 2014 respectively. *GGBH&TD Br.*, p. 6.

GGBH&TD asserts that all three units are enrolled in benefits provided under CalPERS and that "entry into the plan [CalPERS] was collectively bargained." *Id.* GGBH&TD provides the same basic description of the CalPERS plan as IAM: "2.5% @ 55" or "2% at age 60" with single year compensation calculation benefit formula. *Id.* GGBH&TD also acknowledges that following expiration of the existing MOUs, PEPRA requires the benefit calculation for both "new" and "classic" employees to change to a three year average.

With regard to PEPRA and "new" employees, GGBH&TD provides a comprehensive CalPERS PEPRA summary.[14] *Id. at 8.* GGBH&TD also acknowledges that PEPRA sets a defined benefit formula of 2% at age 62, with

[14] The Department has provided the same CalPERS summary in the section titled "Determination," set forth below.

an early retirement age of 52, and a maximum benefit factor of 2.5% at age 67. *Id. at 8.* GGBH&TD also acknowledges that "new" employees under PEPRA will have to contribute 50% of the normal cost. *Id.* at 7. However, GGBH&TD notes that the current negotiated contracts with IAM already require a similar employee contribution, and thus PEPRA has no real effect on new employees. *Id.* Finally, GGBH&TD asserts that "new" employees have "no California vested rights." *Id.* at 2.

For "classic" employees, GGBH&TD asserts that "any change in levels of pension contributions...must be the subject of negotiation and mutual agreement." Thus, GGBH&TD asserts "they may not be unilaterally imposed." *Id.* at 9.

GGBH&TD also states that "as a general proposition...PEPRA does not impair the collective bargaining rights of employees protected by 13(c)." *Id.* at 2. It also asserts that "while a transit agency could not negotiate a higher [benefit] formula [for "new" members], it could bargain over additional benefits..." GGBH&TD adds that "while a transit agency ultimately may not agree to provide new alternative benefits, PEPRA does not stop consideration of such changes as part of the give and take of the collective bargaining process." *Id.*

Analysis of the Parties' Positions

Analyzing the parties' claims requires consideration of relevant legal precedent in this area. In *Jackson Transit Authority v. ATU, Local Division 1285*, 457 U.S. 15, 17-18 (1982), the Supreme Court's recognized that section 13(c) mandates the preservation and continuation of collective bargaining rights as a precondition to receipt of federal transit aid. Specifically, the Court stated:

> To *prevent* federal funds from being used to destroy the collective-bargaining rights of organized workers, Congress included 13(c) in the Act . . . the statute lists several protective steps that *must be taken* before a local government may receive federal aid; among these is the preservation of benefits under existing collective bargaining agreements and the continuation of collective bargaining rights.

Id. at 17 (emphasis added). Shortly after *Jackson Transit*, the U.S. Court of Appeals for the District of Columbia Circuit underscored section 13(c)'s mandate to continue collective bargaining rights. *Donovan v. Amalgamated Transit Union*, 767 F.2d 939 (D.C. Cir. 1985). In *Donovan*, the union objected to the Department's section 13(c) certification in the aftermath of a Georgia state law, Act 1506, which removed various subjects from the scope of bargaining between the transit agency and the union. The court, relying on *Jackson Transit*, reiterated that section 13(c) sets forth mandatory requirements, "not simply general objectives or suggestions." *Id.* at 944. Thus:

> [t]he Secretary is not free to certify a labor agreement that does not provide for the continuation of collective bargaining rights simply because he believes that, on balance, the agreement is fair. Rather, he must first determine that the requirements of the statute [i.e., the five enumerated sections of section 13(c)] are fully satisfied *before* he can find an agreement "fair and reasonable."

Id. at 946. Turning to the specific provisions of the Georgia law, the court characterized the effect of the law as removing mandatory subjects from collective bargaining. The court specifically noted that the provision in the state law that barred the municipal transit agency from negotiating over benefits for part-time employees prevented "the continuation of collective bargaining over wages that section 13(c) mandates." *Id.* at 952. The court concluded that while section 13(c) does not dictate or perpetuate the substantive terms of a collective bargaining agreement, it requires that any changes "be brought about through collective bargaining, not by state fiat." *Id.* at 953.

Under *Donovan* the lessening or diminution of collective bargaining rights, even where they are not entirely eliminated, violates section 13(c). Indeed, the Court in *Donovan* noted that the Georgia law "*altered in several material respects* the existing statutory authorization of [the employer] to engage in collective bargaining" by reserving to management the inherent right to control various aspects of wages and working conditions. 767 F.2d at 951 (emphasis added). However, the law did not restrict the parties from negotiating over *entire* subjects of mandatory bargaining. For example, the law reserved to management the "right to subcontract service, other than for the operation of rail or bus vehicles, provided no employees are laid off." *Id.* This reservation left to the parties the ability to negotiate over subcontracting where layoffs would occur or subcontracting that did involve the operation of bus or rail. Similarly, under the law management reserved to itself "the right to hire part-time employees, for no more than 25 hours per week, without payment of fringe benefits." *Id.* This restriction still permitted bargaining over the hiring of part-time employees for more than 25 hours a week and where fringe benefits would be paid. In addition, the law reserved to management "the right to establish the number of regular hours that may be worked in a week, not to exceed 40 hours, and to fix the number of overtime hours, not to exceed 10 hours per week." *Id.* Once again, this removed only partially the subject of regular and overtime hours from the ambit of bargaining. Yet the court still concluded that the law violated Section 13(c)'s requirement to continue collective bargaining over mandatory subjects. Thus, we conclude that *Donovan* supports the union's position that restricting the right to bargain over mandatory subjects violates Section 13(c)(2).

Senator Morse, the sponsor of section 13(c), stated his intent that transit agencies that "lessen" collective bargaining rights not receive federal funding. As stated in the *Manager's Handbook: Guidance For Addressing Section 13(c) Issues,*[15] "supporters of the bill strongly asserted that the labor protection provisions were not intended to infringe upon or vitiate State or local laws, but rather to assure that the Federal assistance did not diminish any *existing* collective bargaining rights." (Emphasis in original).

There is nothing in *Donovan* or the language of section 13(c) that permits the Department to certify a transit grant if a change in state law substantially reduces existing benefits and significantly limits the scope of bargaining over them. In this instance, because GGBH&TD and its represented transit employees had the ability to bargain over the full panoply of pension rights, the process of collective bargaining with respect to those terms must continue in order for the Department to certify.

Section 13(c) does not supersede the operation of state law and impose federal policy on the state. Indeed, the State of California is free to pass any number of laws affecting public employees. However, if that law is inconsistent with the requirements of section13(c), the state must forego federal funding. As stated in *Donovan,* "Section 13(c) does not prescribe mandatory labor standards for the state but rather dictates the terms of federal mass transit assistance." 767 F.2d at 947. *See Jackson Transit*, 457 U.S. at 27 ("Congress intended that §13(c) would be an important tool to protect the collective-bargaining rights of transit workers, by ensuring that state law preserved their rights before federal aid could be used to convert private companies into public entities") (footnote omitted); *Local Division 589 v. Commonwealth of Massachusetts,* 666 F.2d 618, 627 (1st Cir. 1981) (section 13(c) does not invalidate state law, but states that have laws that prevent the making of fair and equitable arrangements cannot obtain federal assistance).

Under the standard set forth in *Jackson Transit* and *Donovan*, the Department is legally obligated to deny certification where collective bargaining rights have neither been preserved nor continued.[16] As the court in *Donovan* stated,

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[15] G. Kent Woodman, Attorney at Law, Eckert, Seamans, Cherin & Mellott, *Manager's Handbook: Guidance for Addressing Section 13(c) Issues*, (Publication written for the Public Private Transportation Network (PPTN), an Urban Mass Transportation Administration (UMTA) technical assistance program, p. 3. (February 24, 1987).(The opinions findings, and conclusions expressed in this publication are those of the author and not necessarily those of the PPTN, COMIS Corporation (administrator of the PPTN program), the United States Department of Transportation, UMTA, or the Office of the Secretary.) The author has provided services of a technical and advisory nature under contract to the PPTN and is considered an expert in his field.

[16] The Department has similarly held that collective bargaining representatives are not obligated to bargain over benefits that have been unilaterally eliminated, or capped, nor must

section 13(c)'s requirement that labor protective arrangements provide for continuation of collective bargaining rights means, at a minimum, "that where employees enjoyed collective bargaining rights prior to public acquisition of the transit system, they are entitled to be represented in meaningful, 'good faith' negotiations with their employer over wages, hours and other terms and conditions of employment." 767 F.2d at 951. The Department has consistently articulated this position in Departmental correspondence to grantees and unions. The Department's August 16, 2012, *Cover Letter for Referral for Michigan DOT Grant* (MI-04-0052-01); the Department's May 3, 2011, *Initial Response* and May 20, 2011 *Final Response to Objections for Michigan DOT Grant* (MI-95-x065); the Department's June 23, 2011 *Response to Objections for MBTA DOT Grant* (A-70-x001-01).

Federal labor policy, rather than state law, defines the substantive meaning of the collective bargaining rights that must be continued for purposes of section 13(c). Where a state statute forecloses negotiation between management and labor over mandatory subjects of collective bargaining, the Secretary cannot certify. Here, there can be no dispute that pensions are a mandatory subject of bargaining. *Donovan,* 767 F.2d at 952, (citing *NLRB v. Black-Clawson Co.*, 210 F.2d 523 (6th Cir. 1954) (profit sharing plans are "wages")); *Detroit Police Officers Ass'n v. City of Detroit*, 391 Mich. 44, 214N.W.2d 803 (1974) (pensions are a mandatory subject). Therefore, GGBH&TD erroneously claims that state law changes that foreclose collective bargaining over many aspects of pensions are legally consistent with section13(c).

GGBH&TD asserts that prospective employees have no vested right to any benefits. *GGBH&TD Br.*, p. 2. GGBH&TD's assertion has been stated more thoroughly by transit properties (e.g. Sacramento Rapid Transit District) and the state alike, that new employees have not suffered any diminution of rights, because they did not possess rights before PEPRA became effective. Rather, the rights of new employees are established at the time they are hired. In essence, this argument maintains that the State remains free to alter unilaterally the terms of a collective bargaining agreement without running afoul of section 13(c) so long as the employees affected by those changes have not begun working yet. However, there is no applicable distinction between "new" and "classic" employees for purposes of sections 13(c)(1) and (2). Section 13(c)(1) specifically requires preservation of benefits under *existing* collective bargaining agreements, and section 13(c)(2) requires the continuation of collective bargaining rights. Thus, unlike sections 13(c)(3), (4) and (5), these first two subsections protect the collective rights of all bargaining unit members, not individual rights. Under well-established federal labor policy, "[u]nlike a standard commercial contract, a collective bargaining agreement

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they bargain to a predetermined result. *ATU v. City Utilities of Springfield*, Dept. Case No. 9113c18 (June 1, 1999).

binds both those members within a bargaining unit at the time the agreement is reached as well as those who later enter the unit." *Gvozdenovic v. United Air Lines*, 933 F.2d 1100, 1106-07 (2d Cir. 1991).[17] In other words, a collective bargaining agreement is applicable to all bargaining unit members, regardless of their date of hire.[18] As a result, the Secretary cannot certify a grant sought by a transit agency if the transit agency unilaterally reduces the negotiated benefits of any bargaining unit employees, regardless of their date of hire, or precludes the union from negotiating over benefits and contributions for employees hired during the term of the collective bargaining agreement.

DETERMINATION

An analysis of PEPRA's effect on the collective bargaining rights of transit workers covered by the parties' collective bargaining agreement reveals an impermissible conflict with sections 13(c)(1) and 13(c)(2). PEPRA's unilateral creation of two classes of bargaining unit members primarily affects 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" and "classic" employees in the future (thus violating section 13(c)(2)'s "continuation of collective bargaining rights" requirement).

CalPERS has published several documents that discuss how PEPRA affects the plan.[19] Below is a summary of PEPRA's edicts on the plan that is intended to be illustrative but not exhaustive:

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[17] *See Wood v. Nat'l Basketball Ass'n*, 602 F. Supp. 525, 529 (S.D.N.Y. 1984) (citing *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944)), *aff'd*, 809 F.2d 954, 961 (2d Cir. 1987). Protections against unfair labor practices are also applicable to job applicants as "employees" under the NLRA. *See Reliance Ins. Companies v. NLRB*, 415 F.2d 1, 6 (8th Cir. 1969). To hold that collective bargaining agreements do not bind these future employees "would turn federal labor policy on its head." *Nat'l Basketball Ass'n*, 602 F. Supp. at 529.

[18] *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 866 (5th Cir. 1966) (citing *Leroy Mach. Co.*, 147 NLRB 1431, 1431 (1964)). Unions are "entitled" to bargain with employers over terms affecting new hires. *See id.* In *Leroy Machine Company,* the National Labor Relations Board (NLRB) held that the employer violated the NRLA by refusing to bargain with the union over "rates of pay for new jobs, a mandatory subject of collective bargaining." 147 NLRB at 1431. Furthermore, the employer has a duty to bargain "with the collective bargaining agent of the present employees" over conditions of employment "as [they apply] to future employees." *City of New Haven v. Conn. State Bd. of Labor Relations*, 410 A.2d 140, 145 (Conn. Super. Ct. 1979).

[19] See http://www.calpers.ca.gov/eip-docs/employer/program-services/summary-pension-act.pdf) (last visited 9/19/13) and http://www.calpers.ca.gov/index.jsp?bc=/employer/program-services/pension-reform/faq-pra-2013.xml. (last visited 9/19/13).

Summary of Change	PEPRA §	Affects *Classic* Members	Affects *New* Members
Defines "new" member as one who is brought into CalPERS membership for first time on or after 1/1/13	7522.04(f)	X	X
Reduces benefit formula and increases retirement ages for "new" members. 2% at age 62 for all "new" members with an early retirement age of 52 and a maximum benefit factor of 2.5% at age 67.	7522.15 7522.20 7522.25		X
Caps pensionable compensation at $113,700	7522.10		X
Imposes equal cost sharing (i.e. 50% of the total normal cost of their pension benefits) on "new" members and prohibits employer paid member contributions. As of 1/1/18, employers, following bargaining to impasse, may unilaterally require classic members to pay up to 50% of the total normal cost of their pension benefits subject only to a percentage cap on the increase	7522.30 20516.5 20683.2	X	X
Prohibits purchase of additional retirement service credit (ARSC or "Airtime") on or after 1/1/13.	7522.46	X	X
Redefines "pensionable compensation" for "new" members as "the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules."	7522.34		X
Requires 3 year final compensation for "new" members. (i.e. Final compensation means the highest average annual pensionable compensation earned by a member during a period of at least 36 consecutive months). And prohibits employer from adopting less than 3 yr. final compensation period for "classic" members who are currently subject to a 3 year period.	7522.32	may affect "classic" employees	X

http://www.calpers.ca.gov/eip-docs/employer/program-services/summary-pension-act.pdf.

As shown in the chart above, under PEPRA "new" employees now receive a "2% at 62" pension formula, with an early retirement age of 52 and a maximum benefit factor of 2.5% at age 67. Final compensation for "new" employees is based on the highest average annual pensionable compensation earned by a member during a period of at least 36 consecutive months. PEPRA also requires "new" employees to pay 50% of the total normal cost of their pension and prohibits employer paid member contributions. In addition, PEPRA prohibits the purchase of "airtime" for both "classic" and "new" employees.

To better illustrate PEPRA's direct financial effect on the IAM-GGBH&TD plan, the Department asked the parties to compare the pension benefit levels of the IAM-GGBH&TD pension plan with those of PEPRA. The Department specifically asked for a list or chart and to assume a final compensation figure of $5000 per month, for sake of illustration. The parties both submitted charts

which assume a $5000 per month salary. For purposes of illustration GGBH&TD's chart is included below.

GGBH&TD assumes a $5,000 final compensation figure and 25 years of service.[20]

Retirement Age[21]	Current Benefit "Classic" Employees hired before 12/1/12	Current Benefit "Classic" Employees hired after 12/1/12	Benefit Under PEPRA "New" Employees
50	$2500	$1365	$0
52	$2750	$1530	$1250
55	$3125	$1825	$1625
58	$3125	$2197.50	$2000
60	$3125	$2500	$2250
62	$3125	$2840	$2500
63	$3125	$3022.50	$2625
65	$3125	$3022.50	$2875

The PEPRA-mandated segregation of "new" employees from "classic" employee, as well as the changes in benefits and participation rights themselves, demonstrate that the benefits under the parties' *existing* collective bargaining agreements were not preserved in accordance with section 13(c)(1). In essence, "new" employees will have to pay more to fund their pensions and work longer to achieve the same benefit they would have been entitled to before PEPRA. In addition, "new" employees will not be eligible to retire as early in their careers (e.g. the new minimum age under PEPRA is 52). For new GGBH&TD employees, PEPRA unilaterally sets a higher minimum retirement age; reduces pension benefits; imposes a new benefit formula, redefines pensionable compensation and prohibits employer payment of any of the employee share.

GGBH&TD states that any "new" employees would have no vested right to any benefits. No applicable distinction between "new" and "classic" employees exists for purposes of Section 13(c). As stated above, a collective bargaining agreement is applicable to all bargaining unit members, regardless of their date of hire.

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[20] The parties clearly agree to the percent multipliers at each eligible age of retirement for both MOUs but IAM assumes "20 years of service" rather than 25 years as GGBH&TD has done. Assuming the parties had used the same number of years of service to calculate the charts, the charts would be identical.

[21] GGBH&TD's chart includes every quarter year age (i.e., 50 ¼, 50 ½, 50 ¾). Although the chart is helpful in its detail, the Department has condensed it to threshold ages for purposes of this illustration.

Therefore, the Department cannot certify the grant sought by GGBH&TD, because PEPRA has resulted in a unilaterally imposed reduction of the existing benefits of bargaining unit employees.

PEPRA has also impacted rights under section 13(c)(2). Section 13(c)(2) requires "the continuation of collective bargaining rights." As stated above, PEPRA, among other things, unilaterally creates a new class of bargaining unit members, i.e. "new" member; reduces the benefit formula and increases retirement ages for "new" members (2% at age 62 for all "new" members with an early retirement age of 52 and a maximum benefit factor of 2.5% at age 67); requires 3-year final compensation for "new" members; imposes equal cost sharing on "new" members; prohibits employer paid member contributions for "new" members; allows employers, as of 2018, following bargaining to impasse, to require classic members to pay up to 50% of the total normal cost of their pension benefits subject only to a percentage cap on the increase; prohibits purchase of additional retirement service credit (ARSC or "airtime") on or after 1/1/13; redefines "pensionable compensation" for "new" members as "the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules"; and caps pensionable compensation at $113,700. By unilaterally imposing new terms on "classic" and "new" employees, PEPRA forecloses bargaining on these issues for the affected group of employees. These changes sufficiently demonstrate a diminishment or elimination of collective bargaining rights under section 13(c)(2).

CONCLUSION

There is little dispute over the impact of PEPRA on the existing rights of employees covered by the parties' collective bargaining agreement and on the scope of collective bargaining. Indeed, the Department has conferred extensively with the State to determine the contours of the law. GGBH&TD has thoroughly set forth factual bases to support certification. We have carefully considered the submissions of both parties. The parties' submissions serve to demonstrate the conflict which exists here.

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. *Donovan,* 767 F.2d at 949. 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.

GGBH&TD 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, GGBH&TD cannot comply with the requirements of the Act. 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 GGBH&TD.

Sincerely,

Michael J. Hayes, Director
Office of Labor Management Standards

Attachment

cc: Scheryl Portee/FTA
Andrea Phillips/GGBHTD
Jessica Chu/ATU
Benjamin Lunch/Neyhart, Anderson, Flynn & Grosboll
David L. Neigus/IAM
Elizabeth A. Roma/Guerrieri, Clayman, Bartos & Parcelli
Carolyng Gomes/Guerrieri, Clayman, Bartos & Parcelli
Ron Davis/MEBA
Mike Nizetich/MEBA
Marina V. Secchitano/Inlandboatmen's Union

Digitally signed by Tenisha Campbell
DN: cn=Tenisha Campbell, o=Department of Labor, ou=OLMS-DSP, email=campbell.tenisha@dol.gov, c=US
Date: 2013.09.30 16:18:12 -04'00'