



1 statement of decision pursuant to California Code of Civil Procedure § 632 and Rule of Court §  
2 3.1590.

3 **I. PROCEDURAL HISTORY AND EVIDENCE PRESENTED AT TRIAL**

4 Petitioner filed this Petition for Writ of Mandate and Complaint for Declaratory Relief on  
5 May 9, 2012, seeking an order directing the City to pay amounts allegedly earned and vested for  
6 accrued Sick Leave Payout. Petitioner alleged that she was a thirty-year employee of the City  
7 who was denied payment for an accrued right to a Sick Leave Payout upon retirement. Petitioner  
8 initially alleged that her action was brought on behalf of others similarly situated, but at the  
9 hearing Petitioner's attorney indicated that Petitioner was not pursuing a class action. The City  
10 filed an answer to the Petition for Writ of Mandate on June 8, 2012.

11 In support of her Petition, Petitioner filed the Declaration of Lorie Deisenroth on May 1,  
12 2012; the Amended Declaration of Yolanda Cruz on August 15, 2012, with Exhibits A through  
13 H; and the Declaration of Teague Paterson on August 13, 2012. On August 7, 2012, the City  
14 filed a Request for Judicial Notice in Opposition to Petition for Writ of Mandate, with Exhibits 1  
15 through 36; and the Declaration of Jennifer Schembri, with Exhibits 1 through 14. There being  
16 no objection and all parties agreeing, the Court accepted and considered the respective  
17 declarations and exhibits filed with the Court, and took judicial notice of Exhibits 1 through 36  
18 as requested by the City.

19 The evidence presented showed the following. Petitioner first went to work for the City  
20 in May 1980, initially working part-time in a non-bargaining unit position. Starting in  
21 approximately 1983, Petitioner was employed by the City in a full-time position and represented  
22 by the Municipal Employees' Federation ("MEF") bargaining unit of the American Federation of  
23 State, County and Municipal Employees, Local 101 ("AFSCME"). Throughout the period of  
24 time Petitioner was a member of AFSCME, she participated in the City Federated Retirement  
25

1 System. Petitioner retired under the provisions of the Federated Retirement Plan on March 31,  
2 2012, after thirty years of service with the City.

3 Petitioner's employment with the City was subject to a series of Memoranda of  
4 Agreement ("MOA") between the City and MEF. Each MOA with the City during Petitioner's  
5 employment provided for the accrual of sick leave pay for each employee that could be used if  
6 an employee was ill or injured. Until the MOA then in effect expired on June 30, 2011 without a  
7 new agreement in place, each MOA during Petitioner's employment also provided for payout of  
8 a specified portion of unused and accrued sick leave to a retiring employee who met certain  
9 conditions specified in the MOA (referred to in the more recent MOAs as "Sick Leave Payout").

10 In the course of negotiating the MOA that would take effect July 1, 2011, the City and  
11 MEF reached an impasse. In relevant part, the City sought to modify or delete the Sick Leave  
12 Payout provisions. AFSCME made proposals about the Sick Leave Payout that the City did not  
13 accept. When the negotiations failed to produce an agreement, the City imposed a "last, best and  
14 final offer" that provided that no employee would be eligible for a Sick Leave Payout as of  
15 January 1, 2012. The City sent a notice to MEF on December 7, 2011 that the City was  
16 eliminating Sick Leave Payout to any member who retired after December 31, 2011.

17 When Petitioner retired on March 31, 2012, she was denied a Sick Leave Payout. The  
18 City does not dispute that under the provisions of the MOA in effect until June 30, 2011,  
19 Petitioner met all the conditions for and would have been eligible for a Sick Leave Payout when  
20 she retired.

## 21 **II. LEGAL STANDARDS FOR PETITION FOR WRIT OF MANDATE**

22 Petitioner seeks a writ of mandate commanding City to make payment of her Sick Leave  
23 Payout. In order to obtain an ordinary writ under Code of Civil Procedure section 1085, a  
24 petitioner must show that there is no other plain, speedy and adequate remedy, that the  
25 respondent has failed to perform an act despite a clear, present and ministerial duty to do so, and

1 that the petitioner has a clear, present and beneficial right to that performance. (*Riverside*  
2 *Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1289.) If the City has an  
3 official duty to pay the Sick Leave Payout, the act authorizing payment is merely a ministerial  
4 act, and mandamus is an appropriate remedy. (*Thorning v. Hollister School Dist.* (1992) 11  
5 Cal.App.4th 1598, 1603.) The petitioner bears the burden of pleading and proving the facts upon  
6 which the claim is based. (*Riverside Sheriff's Assn. v. County of Riverside, supra*, 106  
7 Cal.App.4th at p. 1289.)

### 8 III. DISCUSSION OF THE MERITS

9 As noted by the City, MOAs negotiated with MEF that provide compensation and  
10 benefits for City's employees are binding when approved by the Council. (Gov. Code, § 3505.1;  
11 San Jose Charter Art. IX, § 902; San Jose Municipal Code, §§ 3.12.010, 3.12.020.) Here, the  
12 MOAs covering the years between 1991 and 2011 stated that an employee who met certain terms  
13 would be entitled to a Sick Leave Payout upon retirement. Petitioner, however, retired on March  
14 31, 2012. Before Petitioner's retirement, the City Council had adopted Council Resolution  
15 75814 stating that "Effective January 1, 2012, no employee shall be eligible for a Sick Leave  
16 Payout."

17 Petitioner argues that she had accrued a vested right to the Sick Leave Payout that could  
18 not be unilaterally eliminated. "A benefit is deemed 'vested' when the employee acquires an  
19 irrevocable interest in the benefit. The 'vesting' of retirement benefits must be distinguished  
20 from the 'maturing' of those benefits, which occurs after the conditions precedent to the payment  
21 of the benefits have taken place or the benefits are otherwise within the control of the employee.  
22 (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171,  
23 1189, fn.3.)

24 The MOA provision relevant to Petitioner's case stated: "Sick Leave Payout shall be  
25 given to full-time and part-time benefited employees who are members of the Federated City

1 Employees Retirement System [at] the time of retirement or death under one of the following  
2 conditions: [¶] Federated City Retirement System. The employee is a member of the Federated  
3 City Retirement System, and retired under the provisions cited in the plan, and credited with at  
4 least fifteen (15) years of service in this retirement plan, or credited with at least ten (10) years of  
5 service prior to a disability retirement.” Petitioner argues that her right to the Sick Leave Payout  
6 *vested* when she attained fifteen years of service and *matured* when she retired. (See Petitioner’s  
7 Mem., p. 8:1-6.)

8 The question of whether the City could discontinue the Sick Leave Payout benefit  
9 retroactively is an issue of first impression in California. However, other state appellate courts  
10 examining the issue have agreed with the position advanced by Petitioner. For example, in  
11 *Champine v. Milwaukee County* (Wis. Ct. App. 2005) 2005 WI App. 75, county employees  
12 complained when the county repealed an ordinance providing for payout of accrued sick leave  
13 upon retirement. The court ruled that “[a]lthough an employee does not automatically have the  
14 right to be paid for accrued sick allowance, an employer may provide a payout provision. Where  
15 that occurs, as in this case, such a benefit represents a form of *deferred compensation* that is  
16 earned as the work is performed. The benefit can be changed, but only as it is related to work  
17 not yet performed.” (*Id.* at p.16.) Although the court found the employees did not have a right  
18 to continue to accrue the benefit after it was repealed, “[o]nce work is performed while a contract  
19 or unilateral promise is in effect, permitting retroactive revocation of that promise would be  
20 unjust and inequitable.” (*Id.* at p.17.)

21 Similarly, in *Logue v. Carthage* (Mo.Ct.App. 1981) 612 S.W.2d 148, plaintiff fireman  
22 began his employment for the city in 1968. In 1975, defendant amended the work rule so that  
23 accumulated sick leave benefits would be payable “only upon employee’s retirement or death.”  
24 Before the amendment, sick leave benefits were payable upon termination (as opposed to  
25 retirement or death). The court agreed that the city could amend benefits prospectively.

1 However, defendant could not amend its work rule to retroactively strip plaintiff of the benefits  
2 which had accrued to him prior to such alteration. (*Id.* at p.150.)

3 Additional out of state cases reached the same conclusion. (See *Harryman v. Roseburg*  
4 *Rural Fire Protection Dist.* (Or. 1966) 244 Ore. 631; *Johnson v. Aberdeen* (1975) 14 Wn. App.  
5 545, 547.) Under this line of reasoning, the Sick Leave Payout is a form of deferred  
6 compensation for employees, like Petitioner, who met certain conditions prior to retirement.

7 The City argues that the expired MOAs cannot be the source of any “clear, present, and  
8 benefit right” to a Sick Leave Payout as the MOAs each had an explicit duration clause. This  
9 position finds some support in *San Bernardino Public Employees Assn. v. City of Fontana* (1998)  
10 67 Cal.App.4th 1215 (*Fontana*). In that case, the Court of Appeal held that certain longevity  
11 benefits “could not have become permanently and irrevocably vested as a matter of contract law,  
12 because the benefits were earned on a year-to-year basis under previous MOU’s that expired  
13 under their own terms.” (*Id.* at p.1224.)

14 However, the benefits at issue in the *Fontana* case were provided to the employees on an  
15 annual basis and eliminated on a prospective basis only, not retroactively. (*Id.* at p.1223.) Here,  
16 the City has retroactively eliminated payout benefits for sick leave that accumulated for thirty  
17 years while the MOAs were in effect, and that Petitioner could not receive under the terms of the  
18 MOA until she retired. As noted in *Fontana*, “[a]n MOU is binding on both parties for its  
19 duration.” (*Id.* at p.1220.)

20 Moreover, a critical factor in the *Fontana* court’s holding is that the benefits at issue were  
21 modified through negotiations between the city and its bargaining groups, then submitted to and  
22 approved by the general membership of those organizations. (*Id.* at p. 1224.) The issue posed in  
23 the *Fontana* case was whether the longevity benefits and accrual of annual leave were properly  
24 the subject of the collective bargaining process. In the present case, the City unilaterally  
25

1 eliminated the Sick Leave Payout after the City and MEF reached impasse and the collective  
2 bargaining process failed.

3         The fact that the MOAs contained start and termination dates does not mean Petitioner  
4 had to retire before the last MOA expired in order to receive the Sick Leave Payout. For  
5 example, in *Naches Valley Sch. Dist. No. JT3 v. Cruzen* (Wash. Ct. App. 1989) 54 Wn. App. 388  
6 (*Naches*), the school district contended that the right to a sick leave cashout expired with the  
7 1980-83 contract. The court rejected this argument, holding that the language of the contract  
8 was unambiguous and that the district agreed to pay the teachers for sick leave accrued as of that  
9 contract period, *even if they retired after the expiration of the contract.* (*Id.* at p.396, emphasis  
10 added.) The *Naches* contract stated that a teacher could cash in his accumulated unused sick  
11 leave “at retirement.” “Retirement,” as used in the agreement, was not limited to any specified  
12 period. (*Id.*)

13         Like the contract at issue in *Naches*, the City’s MOA Sick Leave Payout provisions do  
14 not limit “retirement” to those occurring during the term of the MOA. The Court will not redraft  
15 the MOAs to impose this new eligibility requirement. Additionally, the MOA provision that  
16 even employees who left City service retained their right to the Sick Leave Payout upon eventual  
17 retirement indicates that the payout benefit is decoupled from the duration of any particular  
18 MOA. Such employees, having left City employment, are no longer a part of the bargaining  
19 unit, nor covered by any MOA.

20         The Court finds that although Petitioner is not entitled to a payout for sick leave  
21 accumulated after the last MOA expired and the City eliminated the Sick Leave Payout  
22 provisions (effective as of December 31, 2011), the City could not unilaterally eliminate her right  
23 to a payout for sick leave hours that had accrued prior to the expiration of the MOA. The Court  
24 also finds that the City was entitled to modify or eliminate the Sick Leave Payout on a  
25 prospective basis after expiration of the last MOA.

1 The Court finds that Petitioner has shown that her right to the Sick Leave Payout vested  
2 when she attained fifteen years of service during the term of the MOA, and matured as of the  
3 date of her retirement on March 31, 2012 as to those unused sick leave hours accrued as of  
4 December 31, 2011.

#### 5 IV. PROCEDURAL ISSUES

6 The City raised two procedural defenses to the Petition in this case. The City argues that  
7 Petitioner failed to exhaust administrative remedies that the City contends were available to her,  
8 and that Petitioner failed to file a claim under the Government Tort Claims Act.

9 The City claims that Petitioner should have filed a grievance under the expired MOA, or  
10 alternatively under the City's administrative grievance procedure. The City claims that  
11 Petitioner could have utilized the grievance procedure under the expired MOA "up to the last  
12 step until arbitration." (See Decl. of Schembri, ¶18.)

13 Exhaustion of remedies will not be required where the administrative remedy provided is  
14 unavailable. (*Lopez v. Civil Service Comm.* (1991) 232 Cal.App.3d 307, 312-313.) The Court  
15 agrees with Petitioner that the grievance procedures under the MOA that expired June 30, 2011  
16 were not available to Petitioner in 2012 when she retired, and that a procedure that deprived her  
17 of arbitration was an inadequate remedy.

18 The City also argues that Petitioner could have pursued a grievance under the City's  
19 general administrative grievance procedures. These procedures specifically apply to employees,  
20 and require that any grievance related to alleged violations of a MOA must be pursued under that  
21 MOA. Petitioner's claim did not mature until she retired and she was no longer an employee.  
22 The MOA had expired and did not provide a remedy. "The requirement of exhaustion of  
23 administrative remedies does not apply if the remedy is inadequate." (*Glendale City Employee's*  
24 *Association v. City of Glendale* (1975) 15 Cal.3d 328, 242-343.) The Court finds that Petitioner  
25

1 had no viable administrative remedies to pursue in light of the expiration of the MOA and her  
2 retirement.

3 The City also argues that the Government Tort Claims Act applies to Petitioner's claim,  
4 because she is seeking money damages. Petitioner argues that the Tort Claims Act does not  
5 apply because of exemptions stated in the Code, and that communications her counsel sent to the  
6 City about her claim sufficiently complied with the Act.

7 First, the Court notes that correspondence by counsel that fails to include all information  
8 required under the Act cannot be considered compliance or substantial compliance with claims  
9 presentation requirements. (*Dilts v. Cantua Elementary School District* (1987) 189 Cal.App.3d  
10 27.) Here, counsel's emails to the City demanding payment of the Sick Leave Payout did not  
11 comply with the Tort Claims Act.

12 The City claims that under language found in the *Dilts* case, actions for breach of  
13 employment contracts seeking money damages are subject to the Government Tort Claims  
14 requirements. However, the plaintiff in *Dilts* was terminated in the middle of an employment  
15 contract, and he sought damages for breach of contract that included salary and benefits he had  
16 not yet earned.

17 As the court in the *Dilts* case notes, claims for salaries and wages which have been  
18 *earned* but not paid are exempt from claims presentation requirements under Government Code  
19 section 905(c). See *Dilts, supra*, 189 Cal.App.3d at 32. "Earned but unpaid salary or wages are  
20 vested property rights, claims for which may not be properly characterized as actions for  
21 monetary damages." (*Loehr v. Ventura County Community College District* (1983) 147  
22 Cal.App.3d 1071, 1080.) The Court finds that Petitioner's claims seek earned but unpaid salaries  
23 or wages, and are exempt from claims presentation requirements under Government Code  
24 section 905(c).



SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA  
191 N. First Street  
San Jose, CA 95113-1090

**FILED**

APR 04 2013

DAVID H. YAMASAKI  
Chief Executive Officer/Clerk  
Superior Court of CA County of Santa Clara  
BY Henry Keniston DEPUTY

TO: FILE COPY

RE: L. Deisenroth vs City Of San Jose  
Case Nbr: 1-12-CV-224197

**PROOF OF SERVICE**

TENTATIVE DECISION AND PROPOSED STATEMENT OF DECISION  
RE PETITIONER FOR WRIT OF MANDATE  
DECISION ON SUBMITTED MATTER

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

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Parties/Attorneys of Record:

CC: Arthur A Hartinger , Meyers Nave Riback Silver Et Al  
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If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD line, (408)882-2690 or the Voice/TDD California Relay Service, (800)735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 4/4/13. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Henry Keniston, Deputy