

*In the Matter of Factfinding:*

CASE NO. LA-IM-317-M

*-between-*

COUNTY OF VENTURA

FINDINGS

EMPLOYER

CONCLUSIONS

*-and-*

RECOMMENDATIONS

CRIMINAL JUSTICE ATTORNEYS OF  
VENTURA COUNTY

DAVID B. HART  
CHAIRMAN

UNION

HEARING HELD

June 27, 2023

Ventura, California

REPRESENTING:

COUNTY OF VENTURA

Matthew A. Smith, Esq.  
Office of County Counsel

REPRESENTING:

CRIMINAL JUSTICE ATTORNEYS OF VENTURA COUNTY

Richard Levine, Esq.  
Rains Lucia Stern St. Phalle & Silver PC

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Unable to reach a settlement on the current meet and confer process, David B. Hart was selected by the parties to act as an impartial Chairman and empowered him to render an advisory decision in accordance with the PERB'S rules concerning Fact Finding.

The Hearing was held on the date enumerated and the parties had ample time to present evidence including documents and witnesses.

Panel members submitted to the chairman their perspective of the issues. Prior to the Chairman writing these recommendations.

**‘WHAT TERMS SHALL BE INCLUDED IN THE  
AGREEMENT BETWEEN THE COUNTY OF  
VENTURA AND THE CRIMINAL JUSTICE ATTORNEYS  
OF VENTURA COUNTY?’**

**AB 646 (now contained the PERB Regulations) lays out a set of 8 criteria to be used by a fact finding panel:**

1 **"(d) In arriving at their findings and recommendations, the**  
2 **fact finders shall consider, weigh, and be guided by all the following**  
3 **Criteria:**  
4 **(1) State and Federal laws that are applicable to the employer.**  
5 **(2) Local rules, regulations, or ordinances.**  
6 **(3) Stipulations of the parties.**  
7 **(4) The interests and welfare of the public and the financial**  
8 **ability of the public agency.**  
9 **(5) Comparison of the wages, hours, and conditions of employment**  
10 **of the employees involved in the factfinding proceeding with the**  
11 **wages, hours, and conditions of employment of other employees**  
12 **performing similar services in comparable public agencies.**  
13 **(6) The consumer price index for goods and services, commonly**  
14 **known as the cost of living.**  
15 **(7) The overall compensation presently received by the employees,**  
16 **including direct wage compensation, vacations, holidays, and other**  
17 **excused time, insurance and pensions, medical and hospitalization**  
18 **benefits, the continuity and stability of employment, and all other**  
19 **benefits received**  
20 **(8) Any other facts, not confined to those specified in paragraphs**  
21 **(1) to (7), inclusive, which are normally or traditionally taken**  
22 **into consideration in making the findings and recommendations. "**

## **BACKGROUND**

### **THE DISPUTE:**

### **COUNTY'S FINAL OFFER:**

### **ANNUAL LEAVE PROVISIONS**

1                                    **COUNTY POSITION**

2                                    SEE ATTACHMENT # 1

3  
4                                    **UNION POSITION**

5                                    SEE ATTACHMENT # 2

6  
7                                    **ANALYSIS**

8                    It is generally believed that the best labor-management contracts are those that  
9 are negotiated through bargaining without outside assistance. There are instances,  
10 however, where the parties find it difficult or impossible to reach agreement by direct  
11 negotiation.

12                   In these situations the fact-finding process perhaps, is a way of settling this  
13 dilemma. It is certainly not the panel's intention to prolong or bring obstacles into the  
14 process towards bringing about settlement. It is also not the intent to split the baby so  
15 to speak. The Chairman is not of the belief that would be beneficial to anyone  
16 involved.

17                   After careful consideration and examination of sworn testimony and documents  
18 the Chairman presents the following recommendations in the hope the parties can use  
19 these recommendations to reach an agreement. Unilateral implementation of terms  
20 and conditions by the Employer would tend to disrupt good labor relations. Good  
21 labor relations are a desired goal.

22                   The panel members have had an opportunity to concur or dissent on the issues  
23 as put forth by the Chairman, and attached to these recommendations are those  
24 notations.

25                   SEE ATTACHMENT # 3 FOR THE COUNTY DISSENT

26                   SEE ATTACHMENT # 4 FOR UNION REPLY

**RECOMMENDATIONS**

1. THOSE UNIT MEMBERS WITH 100 HOUR ANNUAL LEAVE HOURS SHOULD BE MANAGED BY THE COUNTY'S FINAL OFFER
2. THOSE UNIT MEMBERS WHO CURRENTLY HAVE 160 HOUR ANNUAL LEAVE HOURS SHOULD BE **"GRAND FATHERED"** UNDER THE PRESENT RULES UNTIL JANUARY 1, 2025. EFFECTIVE THEN, THE COUNTY'S FINAL OFFER CAN TAKE EFFECT. THIS TIME PERIOD WILL GIVE THOSE UNIT MEMBERS TIME TO ADJUST TO THE NEW RULES.
3. THOSE UNIT MEMBERS WHO CURRENTLY HAVE 200 HOUR ANNUAL LEAVE HOURS SHOULD BE **"GRAND FATHERED"** UNDER THE PRESENT RULES UNTIL THEY LEAVE EMPLOYMENT WITH THE COUNTY.

Respectfully submitted;



David B. Hart  
Chairman

Signed and dated this 7<sup>th</sup> day of August, 2023

RECOMMENDATION

THOSE UNIT MEMBERS WITH 100 HOURS ANNUAL LEAVE HOURS

AND IS BEING MANAGED BY THE COUNTY'S LEAD OF HR

AND UNIT MEMBERS WHO CURRENTLY HAVE 100 HOURS ANNUAL

LEAVE HOURS SHOULD BE CONSIDERED UNDER THE

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LEAVE





# COUNTY of VENTURA

COUNTY EXECUTIVE OFFICE  
**SEVET JOHNSON, PsyD**  
County Executive Officer

July 11, 2023

Mr. David Hart  
3597 Trieste Dr.  
Carlsbad, CA 92010

via Electronic Mail

**Mike Pettit**  
Assistant County Executive Officer

**Kaye Mand**  
County Chief Financial Officer

**Shawn Afifi**  
Assistant County Executive Officer/  
Human Resources Director  
Labor Relations

**SUBJECT: Factfinding Recommendation**

Mr. Hart,

Please find my analysis and recommendation based on the information presented during the June 27<sup>th</sup> factfinding session between the County of Ventura (County) and the Criminal Justice Attorneys Association of Ventura County (Association) below.

## **Background**

This impasse arises from bargaining between the County and the Association concerning the terms of a plan set forth in the memorandum of agreement (MOA) between the parties under which employees represented by the Association may redeem accrued annual leave hours for cash. Under this plan, employees represented by the Association, upon using 80 hours of annual leave during the previous 12 months, may request to receive cash in lieu of leave. Employees may make no more than two requests per calendar year. The maximum amount of hours that may be cashed out per year varies between 100 and 200 depending on the employee's length of service and date of hire.

Other than the 80 hours usage requirement and the two requests per year limitation, the leave cash-out plan has no other limitations on an employee's ability to cash out leave up to the applicable maximum. Employees may request cash outs at any time during the year and may cash out leave that was accrued in prior years. Until 2016, substantially similar leave cash-out plans were included in the County's MOAs with its other employee organizations and in its Management, Confidential Clerical and Other Unrepresented Employees Resolution (Management Resolution).

As an employer, the County is required to withhold federal taxes from wages. (26 U.S.C. §§ 3402, subd. (a) (income tax), 3102, subd (a) (FICA tax).) Likewise, the County is required to withhold state taxes from all items of income. (Rev. & Tax. Code, §§ 18662, 18668.) Wages specifically includes amounts deemed to be constructively received from a section 409A non-qualified deferred compensation plan, such as the Association's annual leave cash-out plan. (26 U.S.C. §§ 3401, subd. (a), 409A.) Taxes must be withheld from such constructively received income. (26 C.F.R. §§ 31.3402(a)-1, subd. (b); 31.3121(v)(2)-1, subd. (f).) Accordingly, the County has a legal obligation to withhold taxes from constructively received income. Indeed, if the County fails to withhold taxes, it would be liable for payment of the taxes that should have been withheld as well as penalties. (26 U.S.C. § 3403; *Cifuentes v. Costco Wholesale Corporation* (2015) 238 Cal.App.4th 65, 71-72.)

As a result, the Ventura County Counsel advised both the County Executive Officer and the County's Auditor-Controller of the constructive receipt issue. Based on guidance issued by the Internal Revenue Service, the County determined that the leave cash-out plans could be structured to avoid the constructive receipt of income. The key elements required to avoid constructive receipt are that (1) the election to receive the cash instead of leave must be irrevocably made prior to the beginning of the calendar year (i.e. taxable year) in which the leave is cashed out, and (2) the leave that is cashed out must be earned in the year it is cashed out (i.e, leave carried over from a previous calendar year cannot be cashed out).

Accordingly, in the Summer of 2016, the County informed all of its unions of its conclusion regarding the tax consequences of the constructive receipt of income created by the leave cash-out plans and advised them that the plans could be amended to avoid the constructive receipt of income. The County then provided the Association and other unions with its proposal to amend the leave cash-out plans to eliminate the constructive receipt issue and invited them to bargain. The key components of the proposed amendments were to require employees to make an irrevocable election by December 31 of each year as to the amount of leave hours they would cash out in the subsequent year and to limit the cash-out to leave accrued in that year (i.e., leave rolled over from previous years could not be cashed out and no leave could be cashed out until the leave had been accrued).

By early 2018, the County had reached agreement with all but two of its unions, including the Association. In the succeeding years, the County and the Association have continued to bargain over the terms of the leave cash-out plan and the effects of the County's tax withholding decision.



In January 2021, the Association presented a proposal to the County concerning the leave cash-out plan. However, that proposal would not have resolved the constructive receipt issue as it proposed that the irrevocable election requirement and limitation of cashing out leave that had been accrued in the year of the cash-out would apply only to a portion of its represented employees. (County Ex. 13) The proposal also requested several other changes, many of which were not acceptable to the County. On March 2, 2021, the County submitted a proposal that incorporated some of the Association's requests but included for all represented employees the irrevocable election requirement and limitation on only cashing out leave that had been accrued in the year of the cash-out. (County Ex. 14) The County subsequently advised the Association that the March 2 proposal was its last, best and final offer concerning the leave redemption plan (County Ex. 15) and on May 27, 2022, the County formally declared impasse concerning the leave cash-out plan. (County Ex. 16)

Based on this declaration, mediation was requested by the Association on June 9, 2022. The parties met with a mediator on Friday, July 22, 2022, but did not reach an agreement. A request for factfinding was then made by the Association on August 9, 2022 and the parties held a factfinding hearing on June 27, 2023.

### **Factfinding**

#### **Association Presentation**

During the June 27<sup>th</sup> factfinding session, the Association offered two lengthy presentations; however, the content of these presentations were focused on items unrelated to the effects of proposed changes to the provisions of the County's leave redemption plan (i.e. section 1205 of the MOA between the Association and the County). Instead, much of the information presented by the Association centered around their ongoing disagreement with the County's assessment that its leave redemption plan, as currently set forth in the Association's MOA, creates constructive receipt for its members and the County's subsequent decision to withhold taxes to those found to be in constructive receipt of income. This, however, is not at issue. As stated in the Public Employment Relations Board's (PERB) opinion in case # LA-CE-1260-M and LA-CE-1268-M, "the County's decision to withhold from Association represented employee's salaries is not amenable to resolution through collective bargaining."

Furthermore, in Ms. Coyle's presentation, she focused on purported impacts on pensionable income that she believes would result from the County's proposed amendments to the leave redemption plan. Historically, certain Association members have been able to make four leave redemptions within a 36-month period – the calculation period for pensionable income – which increased "compensation

earnable,” the figure from which pension amounts are derived. Ms. Coyle claimed that the County’s proposed amendments to the leave redemption plan would preclude employees from making the four redemptions within a 36-month period, thereby lessening the Ventura County Employee’s Retirement Association’s (VCERA) calculation of average compensation earnable when calculating a retiring association member’s retirement benefit. However, this is misleading. Association members can still make four leave redemptions within a 36-month period; however, the timing would have to be altered so that the redemptions are done toward the end of the year, after the employee had accrued sufficient leave. The question of whether VCERA will include those four redemptions in the calculation of compensation earnable is a different issue – and is one that is completely unrelated to the County’s proposed amendments to the leave redemption plan. As raised during the factfinding session, VCERA’s Board of Directors voted to disallow the practice of counting all four redemptions in the three-year average (a.k.a. “pension spiking” or “straddling”). That decision is the subject of ongoing legal action, but there is no guarantee that the practice will be reinstated. If it is reinstated, the County’s proposed amendments will impact only the timing of the leave redemptions, not their includability in compensation earnable.

#### **County Presentation**

Since 2016, the County has engaged in multiple rounds of negotiations and has provided numerous proposals concerning the leave redemption plan to the Association. For the entirety of those negotiations, the County has maintained that in order to avoid incurring constructively received income, the amended language for the leave redemption plan must include:

1. An irrevocable election to receive the cash instead of leave must be made prior to the beginning of the calendar year (i.e. taxable year) in which the leave is to be cashed out; and,
2. The leave that is cashed out must be accrued in the year it is cashed out.

Additionally, the County has been clear that it is not interested in providing additional benefits to employees as a result of these amendments. The purpose of these amendments, across the board with all unions, has been to ensure employees covered under a leave redemption plan may avoid incurring constructively received income.

Nevertheless, the County has made efforts to reach agreement with the Association by offering additional beneficial language to the leave redemption plan that does not exist with any other union, including:

- o Increasing the number of vacation redemptions allowed per calendar year to four, when all other unions are allowed a maximum of two; and,

- o Three additional provisions that would allow the Association to revert certain elements of the amended leave redemption plan language back to the current plan language, should it be determined that certain elements of the amendments to the leave redemption plan are unnecessary to avoid constructive receipt.

### **Requests**

At the conclusion of the Factfinding session, the Association submitted a verbal proposal that it would agree to all elements of the County's proposed amendment, if the County would agree to the following:

- 1) Allow Association members to cancel their irrevocable leave redemption election in a given year due to a catastrophic event; and,
- 2) Provide a longevity bonus to all VCERA legacy members (non-PEPRA VCERA members)

The County reaffirmed that its March 2, 2021 proposal remained its last, best, and final offer (LBFO).

### **Analysis & Recommendation**

The Association's proposal at the end of the factfinding session seemed tone deaf at best. While the County can empathize with the Association over the inconvenience of having to redeem leave via irrevocable elections filed in the previous year, or its concerns that irrevocable elections may be impacted by unforeseen circumstances (i.e. illness, injury, or other potential catastrophic events), these are issues that are not unique to this unit. Indeed, the same issues are faced by all of the other units, including the management, confidential clerical and other unrepresented employees unit, that have implemented the amendments to the leave redemption plans and there have been no significant problems. Further, as the County stressed during its presentation, there are two provisions that any amendment to the leave redemption plan must have to ensure that employees do not incur constructively received income. One of those is an irrevocable election and the Association's request for a member to be able to rescind their election with virtually no restrictions in the event of certain circumstances would undermine the irrevocability of their election.

Moreover, despite the fact that the County has been clear that it will not add additional benefits in order to amend leave redemption provision, the Association is requesting a longevity premium for its employees to "offset the economic disadvantages from the County's application of constructive receipt to the Annual Leave Redemption Plan." Putting aside the fact that the County has been clear that it will not add additional benefits, it is hard to see how the parties could quantify a dollar figure based on what the Association sees as an "economic disadvantage" as a result of changes to the leave redemption plan. Also,

it is worth noting a longevity premium is generally applied indiscriminately to employees in the union based on County service and I fail to see how paying a premium that is compensable for the purposes of retirement calculation indiscriminately to employees of the Association, regardless of whether they would have redeemed leave or not, in perpetuity would be a fair offset to a perceived and unquantified "economic disadvantage."

Alternatively, the County has made a fair and reasonable proposal that allows the Association's members to avoid incurring constructively received income and the undesirable tax consequences that result from it, and provides additional flexibility not enjoyed by other County unions, to include four redemptions per year versus two.

Therefore, it is my recommendation that the County's last, best, and final offer, dated March 2, 2021, be accepted and implemented by the parties.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Curnow".

Mike Curnow  
County of Ventura

cc: Elizabeth Tourgeman, Rains Lucia Stern St. Phalle & Silver

# RLS RAINS LUCIA STERN ST. PHALLE & SILVER, PC

Elizabeth Silver Tourgeman  
Attorney at Law  
ETourgeman@RLSlawyers.com

July 21, 2023

VIA ELECTRONIC MAIL [DAVEARB@AOL.COM] & FIRST CLASS MAIL

David B. Hart  
3597 Trieste Drive  
Carlsbad, CA 92010-2840

**Re: Hearing Regarding the Imposition of Constructive Receipt Upon the  
Criminal Justice Attorneys' Association of Ventura County**

Dear Factfinder David Hart:

Below are my suggestions following the factfinding hearing regarding the imposition of constructive receipt upon the Criminal Justice Attorneys' Association of Ventura County ("CJAAVC"). Based upon my careful review of the information and testimony which was submitted at Factfinding hearing, it seems that there is no dispute as to whether the County's decision to apply the principle of constructive receipt of income to the Association's Annual Leave Redemption plan resulted in adverse economic and non-economic impacts to its represented employees. We must be mindful in our deliberations in this matter, that the CJAAVC has been the most vocal employee group in challenging what they believe to be a significant harm and, as a result, the County appears to be routinely and persistently inflexible in their position so as to not appear to "reward" any group that causes waves, even if legitimate. However, as evident by the PERB decision in this matter, the County's imposition of the constructive receipt doctrine to the Association's annual leave plan and the proposed changes to the Association's annual leave plan results in a significant and adverse change to its represented employees. The continuing adverse consequences of the County's application of the constructive receipt was again compellingly demonstrated at Factfinding hearing by the testimony of Association witnesses.

We should be mindful in our deliberations that annual leave is in lieu of paid sick and vacation time. There does not exist a separate paid sick leave account for Association members. Therefore, there are several issues that arise involving planning and flexibility as well as financial. In addition, there is a loss in pensionable income because constructive receipt applies a calendar year while the MOU language for annual leave is any prior twelve-month period. The moving twelve-month period allowed for a maximization of cash out which does not exist when trying to accommodate constructive receipt principles. Also, the principal of earned and accrued income in a calendar year no longer allows for hours carried over to be cashed out.

David B. Hart

**Re: Hearing Regarding the Imposition of Constructive Receipt Upon the Criminal Justice Attorneys' Association of Ventura County**

July 21, 2023

Page 2

The County contends that the only mechanism to avoid withholding tax of constructive receipt of income arising from accrued annual leave (when neither used as paid time off or redeemed for cash), is through utilization by the employee of an "irrevocable election" submitted the tax year before the actual accrual of annual leave. It was undisputed at hearing that the County has *refused* to accept irrevocable elections by the Association's bargaining unit employees unless and until the Association agreed to the other terms and conditions proposed by the County in its last, best and final offer dated March 2, 2021 to Section 1205 regarding the Annual Leave Redemption plan.

It must reasonably be concluded that the County proposed changes to Section 1205 in its last, best and final offer which includes both the irrevocable election in conjunction with other new provisions, fundamentally alters the very nature of the Association's long-standing existing Annual Leave Redemption plan. This feels like punishment to the Association because other groups have been allowed to have an irrevocable election

The use of an irrevocable election (to avoid the constructive receipt of income) the tax year before the actual accrual of annual leave deprives the employees the flexibility to decide *if, and how many*, of the next year's *accrual of annual leave hours will actually be necessary to be used in the event of illness, injury or family leave*. In addition, the obligation for an employee to use an irrevocable election deprives the employees the flexibility to decide, *if, and how many*, of next year's *accrual of annual leave hours would actually be necessary to cash-out for unforeseen financial situations*. Lastly, the effect of the County's last, best and final offer would *deprive employees intending to retire the opportunity to cash out accrued annual leave 4 times within the 3 year period for calculation of pensionable compensation retirement purposes*.

The Factfinding Panel should formulate recommendations that are supportive of revisions to Section 1205/Annual Leave Redemption for the purpose of incorporating the opportunity of irrevocable elections and any *legally necessary* related provisions to properly implement such irrevocable elections, **while also** recommending reasonable and appropriate countervailing provisions in Section 1205 or elsewhere in the Association's Memoranda of Agreement to ameliorate or offset the economic and non-economic adverse effects of such annual leave plan changes.

I would recommend the following:

**Flexibility Issue:**

**Allow the irrevocable election.** Any employee who elected for the next tax year to redeem accrued annual leave time off for cash, but due to unforeseeable circumstances during that next

David B. Hart

**Re: Hearing Regarding the Imposition of Constructive Receipt Upon the Criminal Justice Attorneys' Association of Ventura County**

July 21, 2023

Page 3

year *exhausted* their accrued leave as a result of an unanticipated leave occasioned by a medical emergency, pregnancy, or other protected absence from work, will not be constructively taxed. Any employee who elected for the next year to redeem personal time off for cash who does *not have sufficient hours* in their leave bank as a result of an unanticipated leave occasioned by a medical emergency, pregnancy, or other protected absence from work, should only be required to redeem the hours remaining in their leave bank, and should not be constructively taxed the remaining portion of their redemption obligation.

**Provide a one-time emergency leave bank.** Because the employees don't have a separate sick leave bank, in order to help an employee with an unexpected emergency, we should allow each employee a single grant of emergency leave not to exceed to the amount of their leave redemption limit (200, 160, or 100 hours) to be used for medical emergency, pregnancy, or other unanticipated protected absences from work in the event that they have irrevocably elected to redeem hours for cash. The employee would be required to fulfill their redemption obligation first, and they must exhaust their remaining leave bank, before they can access this bank. They would only be entitled to a grant of hours equal to their redemption obligation and there would be no cash out value.

**Loss in Compensable Pay:**

In order to ensure that the employees represented by CJAAVC are not deprived of their full pension ability of cashed out leave during their last three twelve-month periods before retirement, they must report what is earnable and payable during that period per the Alameda

David B. Hart

**Re: Hearing Regarding the Imposition of Constructive Receipt Upon the Criminal Justice Attorneys' Association of Ventura County**

July 21, 2023

Page 4

decision. This was maximized before the County's application of constructive receipt by utilizing the preceding twelve-month period language of the MOA as opposed to the calendar year applicable to constructive receipt. Prior to the County's application of constructive receipt, it made sense and was possible for an employee to redeem leave for pay four times over 78 pay periods. This is the maximum amount utilizing the accrual rate of 11.08 per pay period, with a 26 pay period year, and a requirement that employees use 80 hours of leave per twelve-month period prior to cashing out leave. This resulted in the ability of an employee hired before May 22, 2005 who can cash out up to 200 hours ("A 200-hour employee") to cash out up to 704 hours during their final compensation period and an employee hired on or after May 22, 2005 who is entitled to cash out up to 160 hours ("A 160-hour employee") to cash out up to 640 hours during their final compensation period. The goal of this factfinding should be to make these employees whole.

**Option One:**

In order to make the above-referenced employees whole, I recommend a slight reduction in the number of hours required to be used by the employee prior to cashing out and a slight increase in the number of hours that can be cashed out in a calendar year. By making these two modifications, the calendar year becomes the basis for the annual leave as well as for the constructive receipt which eliminates the discrepancy but makes them whole.

**Mathematically, this would work as follows:**

**200-hour employee**

Accrual per calendar year is  $11.08 * 26 \text{ pay periods} = 288$



David B. Hart

**Re: Hearing Regarding the Imposition of Constructive Receipt Upon the Criminal Justice Attorneys' Association of Ventura County**

July 21, 2023

Page 5

Less requirement to take 53 hours of leave before cashing out:  $288 - 53 = 235$

Increase cash out to 235 hours per year ( $235 * 3 \text{ years} = 704$ )

**160-hour employee**

Accrual per calendar year is  $11.08 * 26 \text{ pay periods} = 288$

Less requirement to take 75 hours of leave before cashing out:  $288 - 75 = 213$

Increase cash out to 213 hours per year ( $213 * 3 \text{ years} = 640$ )

**Option Two:**

Another solution is to make three redemptions as valuable as four redemptions, taking into account that due to salary raises over time, the later a redemption is made the more valuable it becomes. Right now, redemptions are paid at a "grossed-up" rate, meaning they include the value of certain benefits as enumerated in the MOA. Adding a longevity multiplier for employees who have worked for the County of Ventura for over twenty years, or a series of graduated multipliers would allow three redemptions to have the same monetary value as four redemptions or the value of a 704-hour cash out for the 200-hour employee over three years, or of a 640-hour cash out for the 160-hour employee over three years.

By increasing the cash out value of a 200-hour employee by 18% and of a 160-hour employee by 33%, they will be made whole for pension purposes.

By way of example, a 200-hour employee cashes out with the gross up at approximately 600 hours after constructive receipt in the amount of \$76,998. The gross up amount prior to constructive receipt would be 704 using the same hourly rate with a total of approximately \$90,396. If the \$76,998 were enhanced by 17.7%, the employee would be made whole in total

David B. Hart

**Re: Hearing Regarding the Imposition of Constructive Receipt Upon the Criminal Justice Attorneys' Association of Ventura County**

July 21, 2023

Page 6

cash out at the time of gross up. By way of example, a 160-hour employee cashes out with the gross up at approximately 480 hours with constructive receipt in the amount of \$62,404. The gross up amount prior to constructive receipt would be 640 using the same hourly rate with a total of approximately \$82,131. If the \$62,404 were enhanced by 32%, the employee would be made whole in total cash out at the time of gross up.

**Option Three:**

**Cost of living increases**

CJAAVC members do not have any COLA in their pension. Sheriff, Fire, Probation, SEIU, and the Nurses all have a COLA in their pension. Some members of unrepresented management also have a COLA in their pension. VEA, who has not accepted the County's constructive receipt language, and who have not had it unilaterally imposed upon them, also do not have a COLA in their pension. Adding a COLA to the CJAAVC pension would alleviate the loss to the pension occasioned by constructive receipt.

Again, all of the three options would be in addition to the Irrevocable Election language.

Most importantly, it is essential for the factfinder to do everything humanly possible to prevent the County from unilateral imposition of their last, best and final offer for constructive receipt. To do so sends a message to all of the bargaining units that they will be punished for seeking outside remedies to enforce their legal rights even after they have tried several ways to resolve the issue and incurred years of expenses such as going to PERB and paying attorneys' fees, not to mention being victorious in their pursuit. This would be a huge blow to unions and PERB and their ability to enforce the law.

I reject the County's insinuation during the Factfinding hearing that Association members have no legitimate right to expect the continuation of key features of their long-existing annual leave plan which in essence is a combined sick, vacation and cash-redemption program. As a factfinder, you are intimately aware that public employment gives rise to certain obligations which are protected by the contract clause of the Constitution ....' (*Kern v. City of Long Beach*, 29

David B. Hart

**Re: Hearing Regarding the Imposition of Constructive Receipt Upon the Criminal Justice Attorneys' Association of Ventura County**

July 21, 2023

Page 7

Cal.2d 848, 852-853.)" (*California League of City Employee Associations v. Palos Verdes Library District, supra*, 87 Cal.App.3d at 139.) PERB issued an Order for County to meet and confer with Association over modifying the parties' paid leave plan and the negotiable effects of the County's decision to begin withholding taxes based upon accrued leave hours that it deemed to be constructively received income. The parties should have reached an agreement but it is undisputed that despite numerous counter-offers by Association regarding this subject matter the County has not materially changed its proposal from its initial proposal from 2016 to its declaration of impasse in 2022.

The proposals outlined above offer reasonable and fair solutions to a tax issue that the County believes is necessary to adhere to with respect to annual leave.

Very truly yours,

**RAINS LUCIA STERN  
ST. PHALLE & SILVER, PC**

A handwritten signature in black ink, appearing to read "Elizabeth Silver Tourgeman", written over the typed name.

Elizabeth Silver Tourgeman

EST:cg

cc: Mike Curnow, Labor Relations Manager



# COUNTY of VENTURA

COUNTY EXECUTIVE OFFICE  
**SEVET JOHNSON, PsyD**  
County Executive Officer

August 3, 2023

Mr. David Hart  
3597 Trieste Dr.  
Carlsbad, CA 90210

via Electronic Mail

**Mike Pettit**  
Assistant County Executive Officer

**Kaye Mand**  
County Chief Financial Officer

**Shawn Atin**  
Assistant County Executive Officer/  
Human Resources Director  
Labor Relations

**SUBJECT: Response to Fact Finder's Recommendations**

Mr. Hart,

This letter is in response to the Fact Finder's settlement proposal of July 25, 2023.

Under the Fact Finder's proposal, those Criminal Justice Attorneys' Association of Ventura County (CJAAVC) unit members who are eligible to cash out 160 hours of leave annually would "be grandfathered until January 1, 2025" by the County of Ventura (County) in order to give them "time to adhere to [the] last best and final" offer of the County. Additionally, unit members who are eligible to cash out 200 hours of leave annually would "be grandfathered until they separate from the County employment." The Fact Finder went on to specify that these individuals "should not be subject to the tax provisions that caused undue hardship" during the grandfathered period.

The Fact Finder seemingly based these recommendations on the fact that he could "find no IRS order" that he believes supported the County's tax determination. Furthermore, the Fact Finder pointed to an August 2016 letter written by Jeffrey Burgh, the County of Ventura's Auditor-Controller, to the CJAAVC in which he states that CJAAVC's annual leave redemption plan is "not illegal per se" as further justification for his recommendations.

However, as raised by the County during the proceedings of PERB Case numbers LA-CE-1260-M and LA-CE-1268-M and alluded to in PERB Decision number 2758-M, there are several private letter rulings (PLRs 9009052, 200130015, 200450010) that have been issued by the IRS that provided guidance to the County in determining that its original leave redemption plans created constructive receipt of income for employees. Additionally, Judith Boyette, one of the foremost tax and employee benefits attorneys in the state of California testified during the proceedings of PERB Case numbers LA-CE-1260-M and LA-CE-1268-M and agreed with the County's determination that its leave redemption plans created constructive receipt income for its employees and even discussed the potential consequences for the County should it fail to act on its obligation to report and withhold taxes for all employees who are found to have been in constructive receipt of income.

Furthermore, the Fact Finder's quotation from Mr. Burgh's August 2016 letter overlooks a great deal of context relevant to this matter. While the Fact Finder's quote is accurate, it completely omits the majority of the sentence. The full quotation is:

**"I am writing to notify you that it has come to my attention that the leave redemption plan in your union's Memorandum of Agreement, while not illegal per se, does not fully and clearly comply with federal tax laws." (emphasis added)**

**Moreover, Mr. Burgh goes on to state in that same letter:**

**"...In the absence of an agreement between the County and your union to amend the leave redemption plan in your current MOA to avoid constructive receipt, I am legally obligated to fully comply with federal tax laws, and as such beginning with tax year 2017, I will report as taxable income all income that employees are eligible to receive in lieu of leave/vacation under current plans."**

**Thus, it is true that CJAAVC's leave redemption plan is not illegal. However, it creates tax consequences. The County conducted exhaustive research, including review of PLRs, consulting with its internal Counsel, as well as that of specialty counsel from outside of the County, and made the determination that the current leave redemption plan detailed in the memorandum of agreement (MOA) between the County and CJAAVC creates constructive receipt of income for all employees covered by it. As such, the County has a legal responsibility to report and withhold earnings based on that constructive receipt. The County's LBFO is designed to retain the employees' ability to cash out leave while minimizing the threat of constructive receipt.**

**Accordingly, the County cannot, as a matter of law, agree to the recommendations concerning employees eligible to cash out either 160 or 200 hours per year as they would require the County to intentionally fail to report and withhold earnings of certain members of CJAAVC found to be in constructive receipt for a period of 17 months or in perpetuity, depending on their seniority. This recommendation would require the County to skirt its responsibilities to the IRS and open itself up to financial liabilities for these actions.**

**Based on the above, I cannot agree with the recommendations of the Fact Finder and, therefore, I DISSENT.**

**Sincerely,**



**Mike Curnow  
County of Ventura**

**cc: Elizabeth Tourgeman, Rains Lucia Stern St. Phalle & Silver**

8/5/23, 8:48 AM

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Dear Mr. Hart:

I appreciate your concurrence with our position that the IRS does not mandate the constructive receipt and concur with your proposal. However, in speaking with Mike Curnow, I believe that the County will likely reject the grandfather clause as to the 160 and 200 hour employees to the extent that: 1) County does not want to risk incurring tax penalties in the event that the IRS finds that constructive receipt applies to the Association's annual leave program; and 2) that nearly all other County bargaining units have agreed to constructive receipt principle being applied to their paid leave plans. Consequently, I proposed a settlement proposal that would focus on the economic/retirement damage to the 200 hour employees which could be offset by implementation of a retention incentive pay equivalent to the amount of pensionable compensation of those employees who will sustain diminished retirements due to the County's inflexibility on its proposed changes to the Association's annual leave redemption plan. I felt that the retention incentive could be made part of their upcoming negotiations for a new Memorandum of Understanding which expires October of 2023. We have our first meeting set with the County Human Resources this month. Of course, any of the other proposals we previously sent would work as well, or some variation thereof.

Unfortunately, Mike Curnow rejected all of the above and indicated that the County will never change its position on this topic and will not consider any of your proposals and will not deviate from the last, best and final offer. That said, in order to make this process more meaningful, I am requesting a three-party deliberation of the panel prior to your final recommendation. Otherwise, it is unlikely the County will engage in any real consideration of your thoughts.

Please let me know if that is something you would entertain.

Thank you,

Charity Graham  
Legal Assistant  
**RAINS LUCIA STERN**  
**ST. PHALLE & SILVER, PC**  
747.221.7100 Phone  
747.220.7101 Fax  
[www.RLSlawyers.com](http://www.RLSlawyers.com)

\*\*\*\*\*  
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8/5/23, 8:47 AM

**Subject: Re: Response to Proposal**  
**Date:** 8/4/2023 10:58:37 AM Pacific Daylight Time  
**From:** etourgeman@rlslawyers.com  
**To:** Mike.Curnow@ventura.org  
**Cc:** davearb@aol.com

I am entirely unclear as to what misrepresentation I am being accused of. The county has not and is not willing to change its position despite the evidence presented at the hearing. We are supposed to be a panel deliberating over the evidence. It sounds like the evidence was irrelevant to the County's position. If that is incorrect please correct me with specifics. I believe Mr Hart was simply trying to resolve this long standing dispute Thank you.

Elizabeth Silver Tourgeman  
Attorney at Law  
**RAINS LUCIA STERN**  
**ST. PHALLE & SILVER, PC**  
310.991.0112 Cell  
310.393.1486 Phone  
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On Aug 4, 2023, at 10:51 AM, Curnow, Mike <Mike.Curnow@ventura.org> wrote:

Good morning Mr. Hart,

I have reviewed the email from Ms. Graham, which she presumably sent on behalf of Ms. Tourgeman. To the extent that the email purports to reflect a telephone conversation that I had with Ms. Tourgeman, it misrepresents the substance of my conversation with her on July 28<sup>th</sup>. I do acknowledge, however, that the County's position has been, and remains, that it is not interested in enhancing/swapping other benefits for CJAAVC's unit members in exchange for resolving the constructive receipt issue.

8/5/23, 8:47 AM

I further note that the email sent by Ms. Graham mischaracterizes your email of July 25<sup>th</sup> by stating that you concur with CIAAVC's position that the IRS does not mandate constructive receipt. Nowhere in your email do you explicitly or implicitly state this, nor would it be appropriate for a factfinding panel to attempt to make such a determination on a matter of law.

The email also requests a three-party deliberation of the panel prior to your final recommendation for the apparent purpose of trying to convince the County to change its position. However, this is not a mediation nor a settlement conference. The parties have already provided their respective positions and all that remains is the issuance of the factfinding report. The County does not believe that three party deliberations are necessary, nor provided for by statute.

Thanks,

**Mike Curnow**  
Program Management Analyst  
County Executive Office  
County of Ventura

Tel: (805) 654-2638  
Fax: (805) 658-4526

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**From:** Charity Graham <cgraham@rslawyers.com>  
**Sent:** Thursday, August 3, 2023 4:10 PM  
**To:** David Hart ([davearb@aol.com](mailto:davearb@aol.com)) <davearb@aol.com>; Curnow, Mike <Mike.Curnow@ventura.org>  
**Cc:** Elizabeth Tourgeman <etourgeman@rslawyers.com>  
**Subject:** Response to Proposal

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Program Management Analyst  
County Executive Office  
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