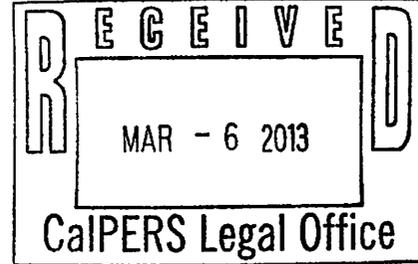


ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

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10
11 BOARD OF ADMINISTRATION
12 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

13 In the Matter of the Appeal Regarding) Case No. 2011-0224
14 Reportable Compensation to Determine) OAH No. 2012100476
15 Final Compensation of:)
16) **RESPONDENTS' ARGUMENT**
17 NADINE P. LEVIN,)
18) Hearing Date: March 20, 2013
19 Respondent,)
20 and)
21)
22 CITY OF MOUNTAIN VIEW,)
23)
24 Respondent.)

21 I. INTRODUCTION

22 This case involves two issues regarding the calculation of Retiree Nadine Levin's final
23 compensation: (1) whether the bi-weekly amount of \$240 in department head additional
24 compensation (referred to as auto allowance) was special compensation and appropriately included
25 as compensation earnable; and (2) whether the short-term pay of an additional 5% of her salary
26 received for her assumption of additional responsibilities as the Interim Employee Services Director
27 was special compensation and appropriately included as compensation earnable. Respondents, the
28 City of Mountain View ("the City") and Ms. Levin, contend that both items were appropriately

1 reported as special compensation pursuant to Government Code § 20636(c) and should be included
2 in final compensation for Ms. Levin. Even if the auto allowance is determined to not be special
3 compensation, Respondents ask the Board of Administration find that the doctrine of equitable
4 estoppel precludes exclusion of this amount from Ms. Levin's retirement allowance.

5 II. ARGUMENT

6 The Proposed Decision finds that the short term pay and auto allowance are not special
7 compensation and therefore, properly excluded from Ms. Levin's retirement allowance. In
8 addition, public policy considerations preclude the doctrine of estoppel from applying in regards
9 to the auto allowance issue. Respondents agree with the proposed decision that the City and Ms.
10 Levin meet the requirements for estoppel based upon their reasonable reliance on the 1996 audit.
11 However, Respondents respectfully disagree that public policy precludes estoppel from applying.

12 The doctrine of estoppel bars CalPERS from excluding auto allowance from Ms.
13 Levin's final compensation. The Proposed Decision finds the public policy exception trumps
14 the estoppel doctrine. As provided in *Golden Gate Water Ski Club v. County of Contra Costa*
15 (2008) 165 Cal. App. 4th 249, if an important public policy adopted for the benefit of the
16 public would be nullified by allowing for the defense of estoppel, estoppel does not apply. *See*
17 *also Crumpler v. Board of Administration* (1973) 32 Cal. App. 3d 567; *In the Matter of*
18 *Decreased Level of Retirement Allowance of Henderson*, case no. 1558, OAH No. L-
19 1997120250 (CalPERS 1998). However, as cited in *Henderson*, estoppel applies when "the
20 injustice which would result from a failure to uphold estoppel is of sufficient dimension to
21 justify any effect upon public interest or policy which would result from the raising of an
22 estoppel" (*Henderson*, at p.11 citing *City of Long Beach v. Mansell* (1970) 3 Cal. 3d 462).

23 In this case, after twenty-plus years of contributions made by Respondents, and a 1996
24 CalPERS audit which found auto allowance to be reportable compensation, the doctrine of
25 estoppel should bar CalPERS from excluding the auto allowance from Ms. Levin's final
26 compensation. In 1996, CalPERS audited the City's payroll practices with the express purpose
27 of verifying that the City's payroll reporting practices comply with CalPERS' policy and
28 requirements. The audit concluded that the auto allowance constituted reportable

1 compensation. The City reasonably relied on the audit findings and continued to report the
2 auto allowance and make contributions on the amount for more than fourteen years thereafter.
3 To find that the doctrine of estoppel does not apply, would in essence mean that contracting
4 agencies should not afford any weight to an audit performed by CalPERS, as at the time of
5 calculating a member's final compensation, despite an agency's reasonable reliance on the
6 audit findings, CalPERS may change its position and exclude items from final compensation
7 that had been previously affirmed by the audit to be reportable compensation.

8 In discussing the doctrine of estoppel, the decision in *Henderson* states "[Estoppel]
9 seeks to prevent a person or entity from profiting from their own wrongdoing." *Henderson*, p.
10 10. CalPERS cannot both require compliance with its audit findings while retaining the ability
11 to change its audit determinations at any future time when calculating final compensation for a
12 particular member. Estoppel is the appropriate remedy to address the inequity of the situation
13 posed by CalPERS' 1996 audit and recent calculation of Ms. Levin's final compensation which
14 seeks to exclude auto allowance.

15 The Proposed Decision finds that inclusion of the auto allowance would contravene the
16 Public Employees Retirement Law (PERL) and grant CalPERS powers not given by the
17 legislature. (Proposed Decision, p. 7). The Proposed Decision further finds that to allow the
18 auto allowance would allow members to have a higher retirement benefit than allowed under
19 the statutory formula, and thus, is adverse to public interest or policy and inconsistent with the
20 Board's fiduciary obligation owed to its beneficiaries.

21 While understanding the Board's fiduciary obligations to its beneficiaries, Respondents
22 ask the Board to find that in light of the fact no unfunded liability or unjust enrichment is at
23 issue, public interest should not trump application of the estoppel doctrine in this case. To find
24 estoppel does not apply would be a windfall to CalPERS in that CalPERS could issue an audit,
25 requiring a contracting agency's compliance, having the benefit of the paid contributions and
26 then in preparing a member's final compensation calculations act contrary to CalPERS own
27 audit findings with impunity, leaving the affected member and agency without recourse. The
28 doctrine of estoppel is the appropriate remedy and CalPERS is barred from excluding auto

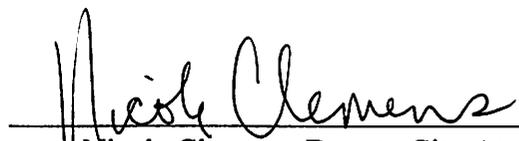
1 allowance from Ms. Levin's final compensation.

2 In addition, the Proposed Decision references Government Code § 20636(g)(4)(I) in
3 Finding 18, which excludes allowance for automobiles for state members from payrate and
4 special compensation. However, this provision only applies to state members and is
5 inapplicable to Respondents. Ms. Levin is not a state member but a local miscellaneous
6 member as set forth in Government Code §§ 20370 and 20383 and indicated in Factual Finding
7 3 of the Proposed Decision.

8 III. CONCLUSION

9 Respondents ask the Board to find the auto allowance and short-term pay at issue are
10 special compensation. Furthermore, the doctrine of equitable estoppel bars CalPERS from
11 excluding the auto allowance from Ms. Levin's final compensation for the reasons articulated.
12 In this case, the asserted public policy argument is insufficient to overcome the inequity
13 Respondents would otherwise suffer. If the auto allowance is found to not be special
14 compensation, this finding should be prospectively applied and the City required to stop
15 reporting and paying contributions on the amount in the future. Ms. Levin paid contributions
16 on the auto allowance amount since 1989 and in reasonable reliance on the CalPERS 1996
17 audit, and thus, it should be included in her final compensation under the estoppel doctrine. If
18 the Board affirms the Proposed Decision, Respondents ask that CalPERS be ordered to return
19 contributions paid by the City and Ms. Levin with interest, as CalPERS has received these
20 contributions for over 20 years and received the benefit of interest earned during this period.

21
22 Dated: March 5, 2013

23 
24 Nicole Clemens, Deputy City Attorney
25 Attorney for Respondents,
26 NADINE LEVIN and
27 CITY OF MOUNTAIN VIEW
28

1 Re: *In the Matter of the Appeal Regarding Reportable Compensation to Determine Final*
2 *Compensation of: Nadine P. Levine and City of Mountain View*
3 Case No. 2011-0224
OAH No. 2012100476

4 **PROOF OF SERVICE**

5 I hereby certify that I am a citizen of the United States, over the age of 18, and not
6 a party to the within action. My business address is 500 Castro Street, Mountain View,
7 California, 94041.

8 On March 5, 2013, I served the following documents:

9 **RESPONDENTS' ARGUMENT**

10 on the following party(s) in said action:

11 **VIA OVERNIGHT MAIL/COURIER – CCP §§ 1031(c), 1013(A), 2015.5**

12 XX By placing a true copy thereof enclosed in a sealed envelope(s),
13 addressed as above, and placing each for collection by overnight mail
14 service, or overnight courier service. I am readily familiar with my
15 firm's business practice of collection and processing of
16 correspondence/documents for overnight mail or overnight courier
17 service, and that is to be delivered to an authorized courier or driver
authorized by the overnight mail carrier to receive documents, with
delivery fees paid or provided for, that same day, for delivery on the
following business day.

18 Cheree Swedensky, Assistant to the Board
19 CalPERS Executive Office
20 P.O. Box 942701
Sacramento, CA 94229-2701

21
22 I declare under penalty of perjury and the laws of the State of California that the
23 foregoing is true and correct and that this declaration was executed on March 5, 2013, at
24 Mountain View, California.

25
26 
27 _____
LYNETTE D. KING