ATTACHMENT A

THE PROPOSED DECISION

Attachment A

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues Against: FRED GUIDO and CITY OF CUDAHY, Respondents.	Case No. 9711 OAH No. 2012030387

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on November 13-15, 2012, in Los Angeles.

Jeffrey R. Rieger, Esq., represented Complainant California Public Employees' Retirement System (PERS).

John Michael Jensen, Esq., represented Respondent Fred Guido.

Juanda Lowder Daniel, Esq., and Christine Hsu, Esq., represented Respondent City of Cudahy.

The record remained open after the conclusion of the hearing for the parties to submit closing argument briefs, which were timely received and marked as described in the ALJ's orders discussing post-hearing events (marked as exhibits A and B); except that Respondent Guido's reply brief was marked as exhibit 229. The record was closed and the matter submitted for decision on April 26, 2013.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Statement of Issues was filed by Karen DeFrank in her official capacity as the Chief of Customer Account Services Division for Complainant.

2. PERS administers a defined benefit retirement plan for qualified employees of the state of California and other contracting local agencies. Benefits for its members are funded through member and employer contributions and investment earnings on those contributions.

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3. Respondent Fred Guido (Guido) is a retired member of PERS.

4. Guido's membership in PERS is based on the service he provided to Respondent City of Cudahy (Cudahy), which participates in PERS as a contracting local agency.

5. As explained in more detail below, Guido was also employed by an agency of Los Angeles County and thereby became a member of the Los Angeles County Employees' Retirement Association (LACERA). On a number of occasions before Guido retired, PERS employees advised him that he qualified for reciprocity between the two different pension systems, LACERA and PERS. Such status would enhance his pension benefits under PERS.

6. On April 7, 2009, Guido filed a Service Retirement Election Application with PERS. He indicated that he intended to retire concurrently from LACERA and PERS, effective June 1, 2009.

7. By letter dated June 30, 2009 (which was the culmination of several communications between Guido and PERS staff), PERS informed Guido that he was not entitled to reciprocal status. Accordingly, his PERS retirement benefit would be drastically less than if he had reciprocity. PERS staff advised Guido of his right to appeal its determination.

8. On July 29, 2009, Guido filed an appeal. He concedes he is not entitled to reciprocity. However, he contends that he relied on erroneous representations from PERS staff that he had reciprocal status to his detriment, in that he made several employment decisions, including retirement, based on those representations. Guido argues PERS should be estopped from denying him reciprocal status, among other theories of relief.

Guido's PERS Service

9. Guido was elected to public office with the City Council of Cudahy and he began serving in 1970.

10. Beginning on October 25, 1975, Cudahy contracted with PERS to provide pension benefits to city council members. The contract provided city council members with service credit for prior years' service back to April 21, 1970. Guido was therefore credited with the time between April 21, 1970, and October 25, 1975.

11. During his tenure on city council, Guido's monthly salary was $150 per month. The salary was set by the Government Code based on the city's population. Cudahy made employee contributions to PERS for Guido based on his salary of $150 per month. Guido contributed a total of $821.41 to the fund while on Cudahy City Council.

12. Guido chose not to run for a fourth term and he left city council in April 1982.

13. Guido's PERS service credit is 12.25 years, based on his membership from April 21, 1970, to April 1982.

Guido's Service Under LACERA

14. Guido joined the Los Angeles County Sheriff's Department as a deputy in March 1973 and was thereafter credited for time and service under LACERA.

15. Guido maintained employment with Los Angeles County through November 1977 (approximately four and one half years). The period in which Guido served positions under both PERS and LACERA is known as "concurrent service."

16. After leaving Los Angeles County in 1977, Guido went into the private sector for the next 19 years in outdoor billboard advertising.

17. Guido returned to employment with Los Angeles County in December 1996 to serve as Los Angeles County Supervisor Don Knabe's Chief of Staff, at which time he began earning additional service credit with LACERA.

PERS Communications to Guido Regarding Reciprocity

18. In Fall 2003, Guido was feeling burned-out in his job with Supervisor Knabe and decided to look for another job in government service. Thinking about eventual retirement, he sought information about what, if anything, was necessary to maximize pension credit for both his PERS and LACERA service.

19. At the time, Guido was earning at least $10,000 per month. He understood that, by law, if he was entitled to reciprocity between the two pension systems, his PERS pension would be calculated using his total PERS service credit multiplied by his much higher LACERA "final compensation" of $10,000 per month, as opposed to his $150 per month compensation from Cudahy. Guido contacted PERS to inquire about the establishment of such reciprocity. PERS' transaction notes for this contact indicate that Guido was "currently with LACERA and may return to a CalPERS agency." That transaction note corroborates Guido's testimony that at the time he was seriously considering whether he would need to find a job in a PERS agency to maximize his PERS benefits. The PERS employee told Guido over the telephone that she thought he had established reciprocity, but she would further research it and send him a letter.

20. By a letter dated October 6, 2003, PERS advised Guido:

> CalPERS has reviewed your account and determined that Reciprocity has been established between CalPERS and LACERA. Since you have established Reciprocity, CalPERS will use the highest final compensation earned under either system as long as you retire on the same date under both

systems and you are not an "Elective or Appointed Officer" on or after July 1, 1994.

Please provide us with your final compensation amount with LACERA. That final compensation amount may be higher than your final compensation amount is with CalPERS.

21. PERS provided Guido a retirement estimate in October 2003 which utilized the $10,000 figure as Guido's final compensation amount for all of the service credit he had earned in connection with his Cudahy employment.

22. When deciding which new job to take in Fall 2003, Guido's choices and opportunities included (1) starting a new position with Los Angeles County in a department that had pension benefits with LACERA or (2) starting a new position with the county in an agency which contracted for pension benefits with PERS.

23. One of those opportunities was with the Los Angeles County Department of Public Works (DPW), which was a LACERA-covered position that would allow Guido to increase his LACERA service credit.

24. Guido also considered a position with the Los Angeles County Community Development Commission (CDC). Although a county department, employees of the CDC are enrolled in the PERS system rather than in LACERA. CDC was the only such county agency; all other county departments were covered by LACERA.

25. Guido consulted with Michael Henry, the County's Human Resources Director. Mr. Henry knew Guido from his work for Supervisor Knabe and respected his abilities. Mr. Henry counseled Guido to consider his retirement in making this employment decision. Along that line, Mr. Henry advised Guido that the position with CDC would help him enhance his PERS benefits if he did not have reciprocity. Guido told Mr. Henry that his reciprocity recently had been confirmed by PERS. Mr. Henry advised Guido about the DPW job as well. Although the agencies in question had the ultimate hiring authority, Mr. Henry wielded substantial clout in the decision-making process. If he referred a specific candidate to a department for an open position, the agency would have to report to him and offer a valid reason for not hiring his referral. Mr. Henry was prepared to refer Guido for the CDC and DPW positions.

26. Based on PERS' representation that reciprocity had been established, Guido determined that he did not need to seek the CDC position to enhance his PERS benefits. He preferred the subject matter work and culture of DPW over CDC and opted to apply for that position. Mr. Henry provided him a referral. In October 2003, Guido transferred to the position of Chief of Administrative Operations of the DPW. He earned the same salary he had with Supervisor Knabe's office.

27. On a date not established in 2007, Guido requested a written retirement estimate from PERS. In doing so, he listed both his PERS service with Cudahy and his LACERA service with the county. In response to the question if he had established reciprocity with another government agency, Guido marked the "YES" box.

28. In a retirement estimate dated October 2, 2007, PERS listed Cudahy as a PERS Employer, Guido's final compensation as $11,775.00 per month, and an estimated modified allowance of over $3,000 a month, indicating Guido had reciprocity.

29. As he began to approach retirement, Guido asked PERS to provide him with an official retirement estimate. On October 20, 2008, PERS again confirmed reciprocity and wrote Guido that:

> CalPERS has reviewed your account and determined that Reciprocity has been established between CalPERS and LACERA.
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> Per your request, CalPERS has used the final compensation amount of $11,838.00 with LACERA. The information in this estimate has been provided by you and has not been verified by your employer. Any changes to your final compensation could affect your retirement estimate and a new estimate would need to be requested.

Guido Retires

30. By early 2009, Guido had decided to retire within the next few months. He again considered his employment options. The expected amount of the LACERA and PERS pension benefits played a determining factor in Guido's decision whether to retire.

31. On April 7, 2009, Guido filed his retirement application form at the Regional PERS Office in Glendale. He indicated on the form that he would retire from two public employment systems effective June 1, 2009, and that he would be using his single highest year of salary with LACERA for purposes of calculating his benefits from both PERS and LACERA.

32. PERS' representative in Glendale who reviewed Guido's application consulted Guido's electronic file in the PERS database, and validated that reciprocity had already been established.

33. Guido relied on the specific representation of the PERS representative that reciprocity had been established and that he was entitled to the higher PERS benefit when he filed his application. Had PERS raised questions about reciprocity at that time, Guido would not have filed his retirement application.

34. After filing his retirement applications with PERS and LACERA, but before retiring on June 1, 2009, Guido was approached by Temple City Mayor Vincent Yu about the City Manager position. Temple City is a PERS contracting city. Respondent was a mentor of Mayor Yu and well-known to him.

35. At that time, Guido did not want to continue working. He felt his career of 30 years was sufficient and he wanted to spend time with his family and pursue personal interests. Since PERS confirmed that he had reciprocity and he was satisfied with the estimated $3,000 per month pension he would receive from PERS, plus an amount from LACERA not specified, Guido told Mayor Yu that he was going to retire and was not interested in applying for the position.

36. Mayor Yu testified that in a closed session meeting on May 5, 2009, the city council rejected the idea of hiring Guido outside of the normal competitive hiring process because their plan was to appoint an acting interim city manager and then engage in the competitive hiring process. The competitive process was multi-staged, in which the city council and its consultants reviewed approximately 18 to 20 applicants, who were initially narrowed down to five, then two, and then the city council made the final selection. Guido did not participate in that process.

37. By a letter dated April 11, 2009, LACERA advised PERS that Guido had requested reciprocity and requested PERS to provide it with Guido's information. On May 18, 2009, LACERA employee Clarence Malone had a telephonic discussion with PERS employee Kerry Griffin. The two concluded that Guido could not establish reciprocity between the two systems because of his concurrent service with Cudahy and Los Angeles County from 1973 through 1977, and because more than six months has lapsed between the time Guido left his position with Cudahy (1982) and re-entered LACERA in 1996. (See Legal Conclusions 3-6.) PERS employee Griffin realized that the prior statements to Guido about reciprocity had been in error and made note of that in Guido's file that day. At the time, the system would have shown that Guido had already submitted his retirement application and the effective date of his retirement. By a letter dated May 19, 2009, LACERA advised PERS that it was unable to establish reciprocity with PERS because Guido had a period of concurrent service between LACERA and PERS. It was not established why the letter did not include that more than six months had lapsed from when Guido left Cudahy and returned to the county.

38. Guido remained employed with the county until he retired on June 1, 2009.

39. By a notice dated June 5, 2009, PERS advised Guido that his PERS service retirement allowance would be approximately $70 per month. This notice did not state per se that reciprocity had been denied, but the stated benefit amount was consistent with him not having reciprocity. At first, Guido believed PERS and/or LACERA had simply made a mistake or had miscommunicated with each other. Guido began writing letters to PERS, explaining that he had been previously advised by PERS that reciprocity had been established and that his pension benefits would be approximately $3,000 per month.

40. At this time, Guido conferred with two attorneys familiar with government pension systems who had contacts with LACERA officials. After discussing the matter with the attorneys, Guido maintained his belief that he still had established reciprocity and that LACERA and/or PERS were simply mistaken.

41. On June 30, 2009, after a few weeks of correspondence with PERS, Guido was advised by PERS that it had denied reciprocity. It was at this time that Guido abandoned his notion that PERS had made a mistake and began believing that PERS would not grant him reciprocity. For the next few months, Guido hoped the attorneys he was working with could persuade PERS otherwise.

42. The Temple City job was not filled by the end of June 2009. In fact, the ads for the position were not placed until June and the applications for the position were still being received in August 2009.

43. Guido made no effort after LACERA and PERS denied reciprocity to seek any other PERS-eligible job or otherwise find a way to achieve his desired retirement allowance from PERS. By the time Guido finally realized his attorneys could not help him and that PERS would not reverse its denial of reciprocity, Guido was unsure how he could set aside his retirement from both systems. He was also simply uninterested in working at that time. He wanted to retire. He was almost 61 years old.

Guido's Knowledge of Reciprocity

44. Guido was a high-ranking public employee, who had experience reviewing, interpreting and applying ordinances and public policies.

45. Guido had received and reviewed materials over the years from PERS and LACERA which explained that a member is not eligible for reciprocity if he leaves one system and does not join the other within six months, or if he has concurrent service with the two systems in question. During the hearing, Guido admitted that he understood those rules when he asked PERS whether he was entitled to reciprocity. He testified that the purpose of his inquiries of PERS was to find out how he could "remarry or reconnect" his LACERA time with his PERS time to take advantage of the 12 years that he had with PERS.

46. Guido testified that when he initially spoke with the PERS employee in Fall 2003, he took her preliminarily statement that he had established reciprocity as "speciously favorable." When asked to elaborate, Guido testified that what he meant to say was that he was "encouraged," understanding that the PERS employee would do further investigation. When PERS confirmed in writing that reciprocity had been established, Guido was satisfied, assuming that he had somehow been "grandfathered in" to different rules. He did not feel the need to investigate how PERS came to that conclusion.

PERS' Systemic Misrepresentations to Members Concerning Reciprocity

47. Emily Perez de Flores was PERS' designated "person most knowledgeable" on reciprocity issues for this hearing. She testified that reciprocity is an important benefit to a member and that it could have a significant financial impact. Ms. Perez de Flores further agreed in her testimony that it would be important to inform a member about problems with their reciprocity status before the member retired.

48. Ms. Perez de Flores became head of PERS' retirement estimate unit in June 2003 and remained in that position until she left that unit in February 2009. The letter that Guido received in October 2003 informing him that reciprocity had been established was prepared when Ms. Perez de Flores was head of the unit. At some point after becoming unit head, Ms. Perez de Flores became aware that her staff was not following correct procedures to validate whether reciprocity had been established prior to sending members letters advising them that reciprocity had been established, and that they were providing erroneous information on reciprocity to PERS members. She therefore oversaw development of procedures to ensure staff properly determined whether reciprocity had been established and that unit staff was trained in those procedures.

49. It was not established when Ms. Perez de Flores first learned her staff was making the reciprocity errors. However, she testified that the above above-described new procedures were in place at least from 2007 to 2009.

50. The retirement estimate unit was generating over 100,000 retirement estimates per year during the time Ms. Perez de Flores was in charge. She does not know how many of those involved reciprocity. Ms. Perez de Flores could not estimate how many members were misinformed about their reciprocity rights.

51. PERS took no action to inform members who had been told reciprocity existed that PERS had not done a complete determination or had given erroneous advice. Ms. Perez de Flores testified that was because no mechanism existed to identify all the individuals who might have received incorrect information. However, Ms. Perez de Flores and her unit had access to the customer transaction note database, which was searchable. The customer transaction note program contains a line entry for "category." Guido's customer transaction notes have several instances in which "Reciprocity" is denoted as the category of an inquiry from him or transaction concerning him. Moreover, as discussed above, a PERS employee placed a note in Guido's customer transaction notes on May 18, 2009, indicating that the employee realized a previous letter to Guido confirming his reciprocity was "sent in error."

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LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The parties do not dispute that Guido bears the burden of proof in this case. Generally, the party asserting a claim has the burden of proof. (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155; Evid. Code, § 500.) Thus, the person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised. (*Coffin v. Alcoholic Beverage Control Appeals Bd.* (2006) 139 Ca1.App.4th 471, 476.) It follows that when an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits]; *Greatorex v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57 [retirement benefits].)

2. The standard of proof in administrative matters such as this is the preponderance of the evidence, unless a law or statute requires otherwise. (Evid. Code, § 115.) In this case, no other law or statute was cited or applies. Since this case does not involve the discipline of a professional license, the clear and convincing standard is not applicable. (*Imports Performance v. Dept. of Consumer Affairs, Bur. of Automotive Repair* (2011) 201 Cal.App.4th 911, 917.)

Guido Does Not Satisfy the Statutory Requirements for Reciprocity

3. Government Code section 20125[1] provides that, "The board shall determine who are employees and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system."

4. The computation of a PERS member's retirement allowance is based, in part, on that member's "final compensation," which is based, in part, on the member's "compensation earnable." Section 20638 provides, in pertinent part, "The average monthly salary during any period of service as a member of a county retirement system shall be considered compensation earnable by a member of this system for purposes of computing final compensation for the member provided: (a)(1) entry into employment in which he or she became a member in one system occurred on or after October 1, 1957, and within 90 days of discontinuance of employment as a member of the other system."

5. Section 20355 provides, in pertinent part, "Wherever in this part the rights of a member, because of membership in another retirement system, are conditioned upon employment within 90 days of termination of membership in this system or another system, with respect to that employment that occurs on or and after January 1, 1976, the period shall be six months rather than 90 days."

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[1] All further statutory references are to the Government Code unless otherwise noted.

6. Pursuant to section 20638, a PERS member has reciprocity, and is able to use his highest salary while working under a LACERA-participating employer to calculate his PERS retirement allowance, if he (1) leaves employment under one system, (2) establishes employment under the other system within six months, and (3) retires concurrently from the two systems. The parties agree that Guido did not satisfy the first two requirements of section 20638, because (a) he did not terminate his PERS-eligible service before starting his first LACERA-eligible service in 1973 (i.e., he had concurrent service), and (b) there was a 14-year break in service between his termination from his PERS-eligible service and his second period of service in a LACERA-eligible service.

Estoppel Is Available Against PERS in this Particular Case

7A. The pivotal issue in this case is whether estoppel is available against PERS, a government entity. That is because appellate courts have held that "estoppel is barred where the government agency to be estopped does not possess the authority to do what it appeared to be doing." (*Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 870.) In *Medina,* the court of appeal found estoppel was not available because the retirement board lacked authority to classify as safety members employees whose duties did not encompass being a police officer and did not otherwise meet the statutory definition of safety members.

7B. PERS also relies on the recent case of *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, in which a trial court awarded increased retirement benefits to a PERS member based on the trial court's reading of the law and, alternatively, based on equitable estoppel. The court of appeal found that the trial court had misapplied the law and it also reversed the trial court's equitable estoppel ruling, explaining: "Because we disagree with the trial court's conclusion, and find section 20636 did at all times preclude PERS from treating Linhart's standby pay as pensionable compensation, we hold any award of benefits to Linhart based on estoppel is barred as a matter of law." (*Id.* at p. 543.)

7C. In this case, PERS argues that applying estoppel is prohibited because Guido does not meet the statutory requirements for reciprocity under section 20638 and therefore PERS does not have statutory authority to provide him with pension benefits for which he does not qualify. However, the prohibition against applying estoppel against a government entity is not as clear-cut as PERS suggests.

7D. For example, Guido cites *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, a case in which the court found PERS had broad authority to reclassify members' pension benefits. In *Crumpler,* the city had misclassified animal control officers as police officers, and had made representations to those employees that they were in fact entitled to greater safety member benefits. When the misclassification came to PERS' attention, it reclassified the officers retroactively as miscellaneous members with less pension benefits and the employees sued. The court of appeal affirmed the trial court's set-aside of PERS' decision, in part, on grounds of estoppel. (*Id.* at pp. 583-584.) Specifically, the court found that, "In view of the statutory powers conferred upon the board by section 20124 [since renumbered as 20125], this is not a case where the governmental agency 'utterly

lacks the power to effect that which an estoppel against it would accomplish.'" (*Id.* at p. 584, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 499.)

7E. Section 20125 relied upon by the court in *Crumpler* is the same statute cited by PERS in the Statement of Issues as one of the applicable statutes in this case. The court in *Crumpler* found that statute gave PERS broad enough authority to reclassify the animal control officers, otherwise subject to a miscellaneous classification, to the safety member classification reserved for police and fire personnel. Thus, *Crumpler* suggests PERS does have broad enough authority to establish reciprocity for Guido.

7F. Next, the *City of Pleasanton* case is not a good fit as applied to this case. In *City of Pleasanton*, there was simply no statutory authority allowing standby pay to be used in the formula for calculating a member's pensionable compensation; stated another way, the member in that case could assert no statute or law which could have provided him with the pension benefits he was claiming through standby pay, other than estoppel. That is not the situation in this case. Even without reciprocity, Guido could still have increased his final compensation in PERS by simply finding a full-time job under PERS his last few years of employment, which would have raised his final "compensation earnable" from $150 per month to something akin to what he was earning when he retired from the county.

7G. Guido's ability to do this was due to what PERS refers to in its closing brief as a "historical loophole," in which local elected officials receiving low monthly payments could still rely on those years of service for purposes of calculating their PERS benefits. In 1993, the Legislature amended the Public Employees' Retirement Law (PERL) to "eliminate windfall benefits to certain elected or appointed board/council members who can now receive full-time PERS credit for monthly meetings." To address that problem, the Legislature provided that a member with such elected or appointed service would have two separate final compensations; one based on his highest elected/appointed pay applied to that service, and the other based on his highest pay in any other PERS-eligible (or reciprocal) job he may have held while a member of PERS or a reciprocal retirement system applied to that other service. (See Gov. Code, § 20039.) However, that prohibition is not retroactive. It only took effect on and after 1994. Guido's service in Cudahy was long before that change, so by law he was entitled to take advantage of that "historical loophole."

7H. PERS admits in its closing brief that "in theory, Guido could have taken advantage of this historical loophole and obtained what the Legislature described as 'windfall' benefits if he had been hired into a PERS-eligible job at full-time pay." As discussed in more detail below, Guido had the opportunity to do so, but did not based on the representations from PERS that he had reciprocal status, which would have essentially provided him with the same pension benefits. In sum, Guido could have formulated a plan, fully supported by statutory authority, to provide him with the benefits he now requests, which makes his situation different from the *City of Pleasanton* case.

8A. Therefore, the *Medina* and *City of Pleasanton* cases cited by PERS do not prevent estoppel from being applied in this case. The ALJ acknowledges the appellate law applying estoppel to pension rights is far from clear; in some respects the decisions are in flux and at odds with each other. Nonetheless, in its decision of *City of Long Beach v. Mansell, supra,* 3 Cal.3d 462, the California Supreme Court provides one last safe harbor to those subject to these choppy seas. Read in this context, *Mansell* stands for the proposition that estoppel is available against a government entity, whether or not the requested relief is within the legal authority of the government agency in question, "when the elements requisite to such an estoppel against a private party are present and . . . the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*Id.* at pp. 496-497.)

8B. The situation the Supreme Court confronted in *Mansell* was the need to balance a clear constitutional prohibition barring the alienation of tidelands on the one hand, against the competing fact that insistence on that prohibition would have caused great harm to the thousands of homeowners who had purchased such lands in the City of Long Beach in detrimental reliance on the assurances that those lands were available for sale. There was no question that the *Mansell* property fell under the alienation prohibition. "It must therefore be concluded that those lands, to the extent they are in fact public 'tidelands' within the meaning of article XV, section 3, of the California Constitution, have not been withdrawn from that category by proper legislative action and remain subject to the prohibition against alienation contained in that section." (*City of Long Beach v. Mansell, supra,* 3 Cal.3d at p. 487.) But the Supreme Court nevertheless found estoppel was warranted against the State and the City of Long Beach, opining:

> We conclude without hesitation that the activities, representations, and conduct of the state and its subtrustee the city during the period here in question rise to the level of culpability necessary to support an equitable estoppel against them relative to the lands described in section 2(a) of chapter 1688. The stipulated facts clearly establish that from an early date the state and city have been aware of the serious and complex title problems in the Alamitos Bay area. More importantly, those public entities have been in a position to resolve such problems and to determine the true boundaries between public and private lands. This they have not done. Instead, they have conducted themselves relative to settled and subdivided lands in the section 2(a) area as if no title problems existed and have misled thousands of homeowners in the process. Under these circumstances we think it clear that knowledge of the true boundaries between state and private lands in the section 2(a) area must be imputed to the public entities in question, and that their conduct in light of this imputed knowledge must be deemed so culpable that fraud would result if an estoppel were not raised. (*Id.* at p. 492.)

8C. Thus, even if PERS does not have the authority to effect the change that Guido requests, the *Mansell* case indicates that estoppel still may be available. In this case, PERS made several misrepresentations to Guido indicating that he had reciprocity when, in fact, he did not. At some point in time, while these misrepresentations were being made, PERS had actual knowledge that its staff was not properly responding to reciprocity inquiries and was giving incorrect information to members. Guido received one or more misrepresentations about reciprocity after PERS came to that understanding. Nonetheless, PERS could have advised Guido about the prior misrepresentations but it did nothing. PERS' argument that it could not have discovered Guido was given erroneous advice about reciprocity was not persuasive. The evidence indicates the consumer transaction database could have been searched under the category of "Reciprocity" contacts. Moreover, once PERS discovered it was systemically providing incorrect information about reciprocity to its members, it would not have been difficult to include an advisement in its annual statements and/or newsletters sent to members; or more directly, a special bulletin advising members of the problem. More alarming is that by May 18, 2009, two weeks before Guido's retirement became effective, PERS staff member Kerry Griffin actually realized that Guido had been misinformed about reciprocity. No evidence was presented explaining why Guido could not have been contacted immediately upon that realization. PERS did nothing to contact Guido (or apparently any other similarly situated member) to advise him of the incorrect reciprocity information he received. PERS' complete failure to correct the false information previously provided to Guido and others is such that fraud would result if an estoppel were not raised in this case.

8D. PERS argues applying estoppel in this case will undercut public policy and is therefore not consistent with the *Mansell* decision. For example, the Court in *Mansell* cautioned that it applied estoppel in that unique case because "the rare combination of government conduct and extensive reliance here involved will create an extremely narrow precedent for application in future cases." (*City of Long Beach v. Mansell, supra,* 3 Cal.3d at p. 500.) PERS contends that applying estoppel to the present case would set a dangerously broad precedent, in that retirement law is highly complex and PERS administers contributions and benefits for over 1.5 million active and retired public employees. PERS fears that if estoppel is applied in this case, it could be applied in any case where a PERS member claims to have relied on inaccurate information from PERS before making decisions about where to work and when to retire. However, this case is much narrower than PERS suggests. Guido is one of a few members who can utilize the previously discussed historical loophole to be in position to assert estoppel. Guido has a unique employment history involving concurrent service and two different stints of service under a LACERA-covered employer separated by several years. Though PERS was unable to provide an estimate of the number of members given incorrect reciprocity information, it is not presumed that such is an overwhelming percentage of the overall PERS population. Moreover, it is assumed that the failures leading to the incorrect reciprocity information is not so systemic that it leaked into other areas of member inquiries. Under these circumstances, it is not anticipated that many members will be able to present circumstances similar to Guido. In *Mansell*, the Court opened the door to estoppel for thousands of homeowners. PERS presented no evidence indicating this case will apply to more than that.

8E. PERS next argues that as a public trust fund with no profit motive, applying estoppel against it will punish the tax-paying public, which is ultimately responsible for funding additional benefits that may be awarded to PERS members by estoppel. However, that is the same argument any government entity can make against applying estoppel in any case, since all government entities are funded by the public. The Supreme Court in *Mansell* was undoubtedly faced with the same situation. But where it would be an injustice under the circumstances to not apply estoppel, such concerns must be set-aside.

8F. PERS also argues the balance of equities does not support applying estoppel here, because the relief Guido seeks is a "windfall" from the above-described historical loophole. This argument completely misses the point. The PERL explicitly permits Guido to have his pension allowance calculated as a product of his highest qualifying PERS compensation multiplied by his total service credit, including his elective service. This is true for all elected city council members or county supervisors who began their elective service prior to July 1, 1994. The Legislature considered service rendered up to that point to be vested under the old arrangements. Guido was perfectly within his right to take advantage of this situation. He missed an opportunity to do so based on PERS' misrepresentations that he had reciprocity. On the other hand, the conduct of PERS tips the balance of equities in favor of Guido. As between the two parties, PERS was more knowledgeable about the complexities of the PERL and reciprocity. Moreover, PERS had constructive and actual notice that it had misinformed several members, including Guido, about reciprocity. Yet PERS failed to take any action to inform those members of this problem. If this case supports a public policy or interest, it is that when the government systemically misinforms its constituents about something material to their lives, subsequently learns of that but then fails to take any action to mitigate the situation, it is in the public interest to allow those potentially harmed to seek equitable avenues of redress, including estoppel.

8G. Based on the above, estoppel is available against PERS in this case, because it would be an injustice to not allow Guido to pursue it, and application of estoppel against PERS will not undercut a public policy or interest.

Guido Established the Elements of Estoppel

9. The requisite elements for equitable estoppel are the same whether applied against a private party or the government: (1) the party to be estopped was apprised of the facts, (2) the party to be estopped intended by conduct to induce reliance by the other party, or acted so as to cause the other party reasonably to believe reliance was intended, (3) the party asserting estoppel was ignorant of the facts, and (4) the party asserting estoppel suffered injury in reliance on the conduct. (*City of Long Beach v. Mansell, supra,* 3 Cal.3d at p. 489.) PERS does not dispute the first two elements are present. PERS was apprised of the facts, i.e., Guido requested a confirmation of his retirement benefits, including reciprocity; it represented to him that he had reciprocity; later, it learned that those representations were incorrect. PERS intended to induce Guido's reliance when making the representations. That is the purpose of providing retirement benefit estimates to members. But PERS contends estoppel is not available here because Guido has not established the third or fourth elements.

10A. In *City of Pleasanton v. Board of Administration, supra,* 211 Cal.App.4th at page 544, the court discussed the third element and explained that the person asserting equitable estoppel must prove he "did not have notice of facts sufficient to put a reasonably prudent man upon inquiry, the pursuit of which would have led to actual knowledge." In this case, PERS argues that Guido did not satisfy the third element of his estoppel claim because he knew or should have known that he did not qualify for reciprocity when he made his inquiries. PERS bases this argument on the facts that over the years Guido had received materials from LACERA and PERS explaining reciprocity (including the prohibition of concurrent service and the six-month re-entry requirement) and his general knowledge of reciprocity; his testimony that PERS' first indication of reciprocity was "speciously favorable;" and that he undertook no effort to research the rules or laws in which he felt he had been grandfathered after reciprocity had been confirmed to him by PERS.

10B. It must be noted that the PERL is complex and not easily accessible to the lay person. The statutes regarding reciprocity cited above are not straight-forward. PERS is the state agency with power and expertise to research and confirm reciprocity, and even PERS' staff failed to properly understand or interpret whether Guido had reciprocity. In its materials, PERS encourages members to contact it for retirement benefit estimates and advice. Guido called and relied on PERS' expertise in this area. A reasonable person in this position would rely on PERS' pronouncements on whether he had reciprocity.

10C. Even if Guido was put on inquiry notice by the annual documents sent to members explaining their benefits, and his general understanding of reciprocity, he met his obligation by inquiring about it directly to PERS. On several occasions PERS told him that he established reciprocity. PERS consistently responded with the same information and the same assurances that reciprocity had been established; there was nothing in any of PERS' communications which would have given Guido reason to seek a second opinion. Even if Guido contacted PERS and specifically told them he doubted their prior answers, the systemic errors by the retirement estimate unit were such that Guido probably would have received the same answer, over and over, as he did. It is not reasonable to foist upon Guido the duty of expending additional money and time seeking other expert opinions when PERS, who should be the expert, kept telling him he had reciprocity.

10D. Seizing on Guido's clumsy testimony that he took the preliminary indication of reciprocity as "speciously favorable" is of no moment. It is clear from the context of his hearing testimony, and the supporting documentary evidence, that Guido simply meant that he was cautiously optimistic with the initial response, in light of the PERS employee telling him that she needed to do further research. PERS quickly confirmed, unambiguously and in writing, that reciprocity had been established. Given how often and consistently PERS staff thereafter told him that he had reciprocity, it was not unreasonable for Guido to assume he had been "grandfathered in" to reciprocity by some set or laws or rules with which he was not familiar. In fact, Guido's city council service in the 1970s and early 1980s had essentially been grandfathered in as full-time PERS service due to the historical loophole discussed above, indicating that the concept of grandfathered pension benefits was not unknown to Guido at the time these events were happening.

10E. PERS' core argument here is that Guido seemingly suspected that he did not have reciprocity, but kept asking the same question over and over again, hoping to hear what he wanted to hear. That indeed would have been a recklessly dangerous game of "gotcha" for Guido to have played, staking his retirement and financial future on PERS' mistake(s). The evidence does not support that conclusion. For example, the PERS employee with whom Guido spoke with in Fall 2003 noted that Guido was making the inquiry because he was trying to decide whether he had reciprocity or needed to re-enter PERS service if he did not. Mr. Henry of the county was clear in his testimony that he warned Guido to not overlook his prior PERS service, but that Guido told him that he had established reciprocity and did not need a job with a PERS-eligible agency. The evidence presented in this case indicates that Guido was at all times focused on maximizing his pension benefits under both PERS and LACERA, he seriously pursued that objective, and he would not have acted recklessly in that regard.

10F. Therefore, Guido met his burden of establishing by a preponderance of the evidence that he was ignorant of the fact that he had not established reciprocity when PERS had misrepresented to him that he had.

11A. Finally, PERS contends Guido did not satisfy the fourth element of his estoppel claim because he did not prove that he reasonably relied on PERS' error to his detriment. In a nut-shell, PERS argues that Guido never applied for or proved he would have been selected for either the CDC or Temple City positions.

11B. The reason that Guido did not apply for either position was because of his reliance on PERS' representations that reciprocity had been established. If he did not believe he had reciprocity, it would have been relatively easy for Guido to obtain the same pension benefits by taking advantage of the historical loophole discussed above and simply finding a position with a PERS-eligible agency in 2003 or thereafter. The evidence presented concerning the CDC and Temple City positions established that such opportunities were available to Guido. It was established by a preponderance of the evidence that had he wanted such a position, Guido was a qualified and desirable candidate for them. In fact, the testimony of Mr. Henry strongly suggests that with his referral, the CDC more probably than not would have hired Guido in 2003. The fact that Guido relied on PERS' misrepresentations is manifest in his statement to Mr. Henry that he had already established reciprocity and did not need a PERS-eligible position; and his decision to not pursue the Temple City position because he believed he had reciprocity and needed no further PERS service.

11C. The real harm done to Guido by PERS' misrepresentations was that he detrimentally relied on the same from 2003 to 2009 when he could have taken steps to remedy the fact that he actually did not have reciprocity. PERS' argument here ignores the essence of estoppel: that Guido acted on PERS' representations by not seeking the positions in question or any other. By the time Guido had submitted his retirement papers and his retirement became effective, it was too late and the damage had already been done.

11D. There is no confusion on whether Guido's reliance was detrimental. Guido thought he had already established reciprocity. His failure to actually take the steps necessary to establish it flowed directly from the fact that PERS had repeatedly told him he had already done so and did not need to do anything further. Once he retired, PERS gave him the bad news that his PERS pension benefit was 97.5 percent less than what PERS had previously told him it would be.

11E. Under these circumstances, Guido met his burden of establishing by a preponderance of the evidence that he reasonably relied on PERS' error to his detriment.

12. As all four elements have been proven, Guido has met his burden of establishing by a preponderance of the evidence that estoppel applies in this case. PERS shall be estopped from denying that Guido has the benefit of reciprocity for purposes of calculating his PERS pension benefits. The order below is therefore warranted. For that reason, determination of Guido's other theories for obtaining the same relief is unnecessary.

ORDER

Respondent Fred Guido is entitled to have his "compensation earnable" based on his "average monthly salary during any period of service" as a member of LACERA, for the purposes of calculating the "final compensation" used to determine his retirement allowance from the California Public Employees' Retirement System, pursuant to Government Code section 20638.

DATED: August 6, 2013

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings