

**ATTACHMENT B**  
**STAFF'S ARGUMENT**

## **STAFF'S ARGUMENT TO DECLINE TO ADOPT THE PROPOSED DECISION**

### Overview

CalPERS Staff argues that the Board should reject the Proposed Decision, in favor of its own decision, after conducting a full hearing in accordance with its policies. Staff's argument is based on the following:

- I. The Proposed Decision incorrectly finds that Fred Guido ("Guido") met his burden of proof to establish all four elements of equitable estoppel, when Guido only met his burden of proof on two of those elements;
- II. The Proposed Decision does not correctly apply the law of equitable estoppel as applied against a public entity; and
- III. Rejecting the Proposed Decision and referring the matter back to the Administrative Law Judge will not correct the Proposed Decision's legal deficiencies, as no additional evidence is needed to determine the issues.

### Legal and Factual Background

The computation of a CalPERS member's retirement allowance is based, in part, on that member's "compensation earnable" while working for a CalPERS-eligible employer. If a member satisfies the requirements of Public Employees' Retirement Law (PERL) section 20638, his "compensation earnable" may be based on his highest salary earned while working under another public retirement system, such as the Los Angeles County Employees' Retirement Association ("LACERA"). This is commonly referred to as "reciprocity."

Prior to 1994, there was a loophole in the PERL that was resulting in windfall benefits being paid to local officials. That windfall arose from the fact that local officials were receiving full-time service credit for part-time service. In many cases, officials received nominal pay for their part-time service (e.g., Guido made only \$150 per month for his part-time service on the Cudahy City Council). The contributions that they and their local governments paid to fund their CalPERS retirement benefits were based on that nominal pay. But, if a local official also was employed in a regular full-time CalPERS-eligible job, or in a job entitling him to reciprocity, he could apply his highest "compensation earnable" from that full-time job to all years of service credit in CalPERS, including the service credit he earned as part-time official for nominal pay. The Legislature fixed this problem in 1994, but only for future local officials as of July 1, 1994.

Guido is a former local official who, in theory, can still take advantage of this historical loophole, based on his service on the Cudahy City Council from 1970 to 1982. Guido contends that he would have taken a CalPERS-eligible job at the end of his career in order to increase his CalPERS retirement allowance, if he had known that his service

under LACERA did not allow him to achieve essentially same result. He claims that, because CalPERS misinformed him that his highest pay from Los Angeles County would apply to his 12 years of CalPERS service credit under PERL section 20638, he decided not to pursue employment in a CalPERS-eligible job.

Guido argues that CalPERS should be required to grant him reciprocity, even though he does not qualify for reciprocity under PERL section 20638. This would increase his retirement allowance from less than \$1,000 per year to almost \$40,000 per year, for the rest of his life (plus annual cost of living increases). This amount would be paid in addition to his LACERA retirement allowance, which is based on his 17 years of service and highest pay from Los Angeles County. Guido's LACERA retirement allowance is not at issue in this administrative appeal.

### The Proposed Decision

The Proposed Decision finds that Guido met his burden of proof to establish the four elements of equitable estoppel and further finds that equitable estoppel can be applied to require CalPERS to grant Guido reciprocity under PERL section 20638.

The Proposed Decision acknowledges that Guido knew the requirements of reciprocity and that he did not satisfy those requirements, but accepts Guido's explanation that he was justified in assuming that he had somehow been "grandfathered in" to an older set of rules under which he qualified for reciprocity.

The Proposed Decision finds that Guido satisfied his burden of proof that he would have taken a CalPERS covered job in 2003 to obtain essentially the same result he seeks here, if CalPERS had not led him to believe that he qualified for reciprocity. This finding was based entirely on Guido's testimony and the testimony of the former Los Angeles County Human Resources Director that, in 2003, there was a CalPERS-covered job within Los Angeles County that the two of them had discussed and for which the two of them thought Guido was qualified. No testimony was offered from any person with actual hiring authority for that job and no documents were submitted in support of Guido's claim that he would have been hired for the job.

The Proposed Decision then relies primarily on *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567 and *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, to find that estoppel can be applied to require CalPERS to grant Guido reciprocity, even though he does not meet the statutory requirements under PERL section 20638. The Proposed Decision finds that Guido's case is distinguishable from the cases staff argued should govern, including primarily *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864 and *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522.

The Proposed Decision gives no weight at all to the fact that Guido is seeking a windfall. Specifically, he is seeking a pension of approximately \$40,000 per year for the rest of

his life based on 12 years of part time service for which he was paid only \$150 per month, with his and the City's contributions to CalPERS based on that nominal pay.

Why The Proposed Decision Should Be Rejected

The Board and CalPERS staff have a fiduciary responsibility not to pay benefits in excess of those authorized under the PERL. Thus, a member of CalPERS should not be entitled to receive benefits in excess of those authorized under the PERL, even if that member came to believe he was entitled to such excess benefits based on inaccurate information that he received from CalPERS staff. This is why estoppel is strictly limited in its application against public entities and case law holds that it should not be applied to expand statutory rights to public retirement benefits. If that were not the case, CalPERS benefits would be governed not by law, but rather by the communications from staff to CalPERS members, which are sometimes flawed, either as a result of a human error, a flawed internal procedure or a computer error.

Under well-settled law, estoppel may be applied against a public entity only in what the courts have referred to as "rare," "special," "unusual," "exceptional," "unique" or "extraordinary" cases. In the present case, staff respectfully submits that Guido failed to meet his burden of proving that his case is one of those "rare," "special," "unusual," "exceptional," "unique" or "extraordinary" cases.

CalPERS Staff contends that the Proposed Decision contains the following errors:

(1) Guido admitted that he knew the rules of reciprocity and he knew that he did not have reciprocity under those rules. Thus, CalPERS staff contends that Guido should have made further inquiries on this subject after he received inaccurate information from staff stating that he had established reciprocity. Guido claims that he assumed that he had been "grandfathered in" to some older set of reciprocity rules, even though CalPERS staff never told him that, and he never asked CalPERS staff whether that was actually the case. CalPERS Staff contends that, under these facts, Guido did not satisfy his obligation to make the reasonable inquiries that a "prudent person" in this situation would make, given that he was on notice that he may have received inaccurate information. See *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 544 (a 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.")

(2) CalPERS Staff contends that Guido also failed to satisfy his burden of proof that he could have taken a CalPERS job to obtain the result he is seeking here, if he had not received the inaccurate information from CalPERS staff. Guido did not put on any evidence that he received any job offers or that he was qualified for any particular CalPERS-covered job. Rather, his evidence on this point was comprised solely of testimony by Guido and the former Los Angeles County Human Resources Director that there was a CalPERS-covered job within Los Angeles County that the two of them had discussed and for which the two of them believed he was qualified. He did not apply for

that job, though, and he did not put into evidence any testimony of any person with hiring authority for that job to support his claim that he could have taken that job. He also did not put any documents into evidence on this subject. CalPERS Staff contends that, based on Guido's weak evidence on this point, he failed to meet his burden of proof that he relied on the inaccurate information from CalPERS staff to his detriment.

(3) CalPERS Staff contends that, in finding that equitable estoppel should be applied against CalPERS in this case, the Proposed Decision makes the following legal errors:

(a) The Proposed Decision's reliance on *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, is incorrect and would set a dangerous precedent. It is questionable whether the 1973 *Crumpler* case is even good law any longer in light of the cases that have been published in the last 40 years stating that estoppel may not be applied to expand a retirement system member's statutory rights. See *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864; *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522. The Proposed Decision states that, because the Board has broad authority to determine member rights under PERL section 20125, it was not beyond CalPERS staff's authority (working on behalf of the Board) to grant a member reciprocity when the member did not qualify for reciprocity. If that were the rule, members' rights would be governed by the extent of the errors of CalPERS staff, rather than by the PERL. Assuming *Crumpler* has any remaining precedential value, it should be construed narrowly to the facts of that case, which involved the Board's determination of membership classification (safety vs. miscellaneous). Such determinations may require an exercise of discretion and judgment in close cases. In contrast, there was no judgment or discretion for staff to exercise regarding Guido's reciprocal rights. Even the Proposed Decision acknowledges that he clearly was not entitled to reciprocity under the PERL.

(b) The Proposed Decision's efforts to distinguish this case from *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864 and *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, are flawed. The Proposed Decision argues that Guido could have obtained the benefits he seeks if he had not received the inaccurate information from CalPERS staff. The Proposed Decision states that this makes this case different from *Medina* and *City of Pleasanton*. This is not an accurate analysis of *Medina* and *City of Pleasanton*. Although the facts and circumstances of those two cases are different from the present case, in both of those cases the members could have obtained the benefits they were seeking by taking different actions if they had known CalPERS' ultimate benefit determination at an earlier stage. The plaintiffs in *Medina* could have taken safety jobs to obtain safety service credit. The plaintiff in *City of Pleasanton* could have obtained the benefit he sought if the City had characterized the pay differently in an MOU. Indeed, the City, which was aligned with the plaintiff in that case, contended that it would have characterized the pay differently, if it had known CalPERS would ultimately deny the benefits at issue in that case.

(c) The Proposed Decision's analysis of *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 is flawed. The dispute in *Mansell* related to a claim that certain areas of land in Long Beach were not available for development and therefore thousands of businesses and homeowners who had established deep roots in that community were holding their land illegally. This claim was made after decades of litigation, settlement agreements and local legislation had attempted to clarify that issue so as not to unfairly impact those thousands of home owners and businesses. The California Supreme Court found that case to be one of "those exceptional cases where justice and right require[d] that the government be bound by an equitable estoppel." *Id.* at 501 (internal marks omitted). The court concluded that "manifest injustice would result if the very governmental entities whose conduct [over a span of forty-seven years had] induced" those citizens to settle on the land were permitted to "assert a successful claim of paramount title." *Id.* at 499. Since *Mansell* was published in 1970, numerous published opinions have explained that the application of estoppel against a public agency is "rare" and only available in a "special," "unusual," "exceptional," "unique" or "extraordinary" case, like *Mansell*. See *West Washington Properties, LLC v. Department of Transportation* (2012) 210 Cal.App.4th 1136, 1146; *Golden Gate Water Ski Club v. County of Contra Costa* (2008) 165 Cal.App.4th 249, 259; *Poway Royal Mobilehome Owners Assn. v. City of Poway* (2007) 149 Cal.App.4th 1460, 1471; *Seymour v. Cal.* (1984) 156 Cal.App.3d 200, 203; *Chaplis v. County of Monterey* (1979) 97 Cal.App.3d 249, 259. The level of reliance in *Mansell* and the level of injustice that would have resulted in *Mansell* if the court had not applied estoppel are vastly greater than Guido's reliance here or the alleged injustice he claims he will suffer if he does not receive a \$40,000 per year pension for 12 years of part time service as a Cudahy City Council (for which he was paid only \$150 per month). Further, *Medina* and *City of Pleasanton* were decided after *Mansell*, and make clear that *Mansell* should not be extended to allow retirement system members to expand their statutory rights to benefits.

(d) The Proposed Decision fails to give adequate consideration to the nature of the benefits Guido seeks. These benefits were the product of a loophole that should have never existed in the law. Just because Guido could have, in theory, obtained windfall benefits does not mean that the Board should apply estoppel to award him those benefits. Even if estoppel is legally available to Guido in this case, the Board must balance the equities. The windfall nature of the benefits at issue, combined with Guido's own failure to make reasonable inquiries as to how he could have qualified for reciprocity when he knew that he did not satisfy the only rules of which he was aware, should tip the scales in favor of not applying estoppel.

Proposed Board Action

Based on the serious flaws staff believes appear in the Proposed Decision's analysis, CalPERS staff recommends that the Board reject the Proposed Decision and hold a Full Board Hearing. Once the Board considers all of the evidence and arguments in full context, the Board can then decide for itself whether this case might be one of those "rare" cases in which estoppel is appropriately applied against a public agency. CalPERS Staff contends that it is not. Even if the Board disagrees with staff and ultimately decides to grant Guido's appeal, it is essential that any such decision in Guido's favor not be based on an incorrect application of the law of estoppel that would undercut the Board's and staff's mission to pay only those benefits authorized under the PERL. Thus, at minimum, the Board should grant a Full Board Hearing, so that the Board's final decision, whatever it may be, is supported by a correct and reasonable application of law.

October 16, 2013

  
\_\_\_\_\_  
MARGUERITE SEABOURN