

ATTACHMENT A
STAFF'S ARGUMENT

STAFF ARGUMENT TO DENY FRED GUIDO'S APPEAL

I. THE BOARD'S REQUEST FOR A FULL HEARING

The Proposed Decision issued by the Administrative Law Judge ("ALJ") on August 6, 2013, found that member Fred Guido ("Guido") did not qualify for reciprocity under Government Code section 20638, but recommended that the Board grant Guido reciprocity based on equitable estoppel. The Board of Administration ("Board") rejected the Proposed Decision and requested a Full Board Hearing in this matter at its October 16, 2013, meeting.

II. SUMMARY OF THE CASE

The Board must administer CalPERS in compliance with the California Public Employees' Retirement Law ("PERL"). Because the PERL is complex and CalPERS staff must administer benefits for over 1.6 million members who each have different individual circumstances, staff sometimes incorrectly advises a member that he or she is entitled to receive more benefits than the PERL allows. Notwithstanding the sympathy that staff and the Board may have for such members, the fact remains that, as a matter of sound public policy, it is essential that benefits not be granted by administrative errors. This is why California Supreme Court precedent is clear that equitable estoppel is rarely available to those who seek funds from the government. Indeed, several cases hold that equitable estoppel is never available to expand statutory rights to retirement benefits.

In the present case, CalPERS member Fred Guido asks the Board to apply equitable estoppel to expand reciprocity rights under the PERL. Guido admits that he does not qualify for reciprocity under the PERL, but he argues that he should be granted reciprocity because CalPERS staff inaccurately told him that he qualified. He further claims that he made decisions about where to work and when to retire based on that inaccurate information.

CalPERS did provide Guido with inaccurate information. CalPERS contends, however, that Guido (1) did not prove that he reasonably relied on that inaccurate information, because he admitted that he knew the correct rules of reciprocity before he received the inaccurate information, and (2) did not prove that he could have obtained the increased retirement allowance he seeks, but for his receipt of the inaccurate information from CalPERS.

Perhaps more important than these evidentiary matters, though, is the policy question before the Board: Even if Guido had met his evidentiary burden of proof, would the Board allow Guido to expand statutory rights to reciprocity, based on inaccurate information he received from CalPERS staff? Staff respectfully submits that the Board should reject Guido's request that the Board grant him a benefit for which he does not qualify under the PERL.

III. ISSUES PRESENTED

- (1) Did Guido satisfy his evidentiary burden of proof on his equitable estoppel claim?
- (2) Even if Guido satisfied his evidentiary burden of proof, should equitable estoppel be available to him under the circumstances of this case, as a matter of law?
- (3) If the Board finds against Guido on equitable estoppel, should the Board award him the benefits he seeks under his alternative theories based on the Board's fiduciary duties, the PERL's correction statute, an alleged statute of limitations and/or laches?

IV. STATEMENT OF FACTS

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 PERL section 20638, "compensation earnable" may be based on 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 what the Legislature described as "windfall" benefits being paid to local officials. Those "windfall" benefits 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. 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 with a "reciprocal" employer, he or she could apply the highest "compensation earnable" from that full-time job to all years of service credit in CalPERS, including the service credit earned as a part-time official for nominal pay. The Legislature closed this loophole in 1994, but only for future local officials as of July 1, 1994.

Guido served on the Cudahy City Council from 1970 to 1982 and received nominal pay of \$150 per month for his part-time service. In the late 1990s, Guido began working for Los Angeles County, but did not qualify for reciprocity, due to the long break between his service with Cudahy and his service with Los Angeles County. He also had four years of "concurrent" service with Los Angeles County in the 1970s, which does not qualify him for reciprocity. To establish reciprocity, there must be a break in service between two reciprocal agencies and that break can be no longer than six months.

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 the 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 (based on his nominal pay from Cudahy) to almost \$40,000 per year (based on his full-time pay from Los Angeles). This amount

would be paid in addition to his substantial LACERA retirement allowance, which is based on his 17 years of service and highest pay from Los Angeles County.

V. ARGUMENT

A. Guido Did Not Satisfy His Burden Of Proof On His Estoppel Claim

1. Guido should have known that he did not qualify for reciprocity

In *City of Pleasanton* (2012) 211 Cal.App.4th 522, the court explained that a person asserting equitable estoppel must prove that 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.” *Id.* at 544.

Guido was a high-ranking public employee, who had experience reviewing, interpreting and applying law. Reporter’s Transcript (“RT”) 2 at 8:15-12:21. He had received and reviewed numerous materials from both CalPERS and LACERA that clearly explained the correct rules of reciprocity, under which he did not qualify. See Ex. 6 (at PERS 75); Ex. 34 (at LA 028); Ex. 35 (at LA 073); Ex. 36 (at LA 119); Ex. 42 (at LA 202); Ex. 45 (at LA 318); Ex. 204 (at FGUIDO 000041); RT2 at 32:1-33:3 and 35:20-37:20.

On direct examination, Guido gave no indication that he knew the rules of reciprocity before he started asking questions of CalPERS. Indeed, he testified that he had no opinion “about whether reciprocity applied to [his] case.” RT1 at 78:14-17. On cross-examination, however, Guido admitted that he understood those reciprocity rules before he started asking CalPERS whether he was entitled to reciprocity. RT2 at 43:16-24. On re-direct, he then testified that the purpose of his inquiries of CalPERS was “to find out how [he] could remarry [his], or reconnect rather, [his] county time with [his] CalPERS time to take advantage of the 12 years that [he] had with CalPERS.” RT2 at 79:11-80:4. He testified that the information he initially received from CalPERS indicating that he had established reciprocity was “speciously favorable.” RT2 at 83:13-19. Upon receiving the inaccurate information from CalPERS that he had already established reciprocity, he then made the assumption that he had somehow been “grandfathered in” to different rules than the only rules he had ever reviewed. RT2 at 80:16-81:19. This assumption was not based on any information that he had received from CalPERS or any other source. RT2 at 112:1-6. He made no effort at all to confirm that his assumption was accurate. RT2 at 112:18-114:6. Guido explained his rationale for not making any efforts to confirm his assumption: “I was pleased that I had this letter. I didn’t feel I had a duty to investigate to find how they came to that conclusion.” RT2 at 112:22-24.

Rather than taking the steps that a reasonably prudent person would have taken to determine whether he actually had been “grandfathered in” to some unspecified set of rules that were different than the rules appearing in the numerous written materials he received from CalPERS and LACERA, Guido just kept asking for the same types of reciprocal retirement estimates, which elicited the same response from CalPERS each time. He never asked CalPERS how he could have established reciprocity given that he knew he did not qualify under the only rules he had ever reviewed.

For these reasons, Guido had “notice of facts sufficient to put a reasonably prudent man upon inquiry, the pursuit of which would have led to actual knowledge.” *City of Pleasanton, supra*, 211 Cal.App.4th at 544.

2. Guido did not reasonably rely on CalPERS’ error to his detriment

Guido claims that, if he had known that he was not entitled to reciprocity, he could have obtained the retirement allowance he seeks by taking one of two CalPERS-covered jobs that he claims were available to him. Guido did not meet his burden of proof that he would have actually been hired into either of those jobs, though.

Guido did not apply for the Community Development job and he was not interviewed for that job. RT2 at 146:13-20. He put no documents into evidence regarding that job or his alleged qualification for it. He did not call any witness who had hiring authority over that job. The one witness (other than Guido himself) who testified about the Community Development job, testified: “I wasn’t in the position to make them hire him. I could only offer him to them and give them the credentials and show how he fit in that particular position.” RT2 at 130:18-21. No witness with hiring authority testified that Guido was qualified for the job, much less that he would have been hired for the job.

Guido did not apply for the Temple City job and he was not interviewed for that job. RT1 at 48:16-24. He put no documents into evidence regarding that job or his alleged qualification for it. The one witness (other than Guido himself) who testified about the Temple City job, Mayor Yu, was one of five voting members of the City Council, which had hiring authority for the job. In responding to the question of whether he had authority to hire Guido, Mayor Yu testified: “No, sir. I am one of the five City Council members.” RT1 at 31:4-7. Thus, at least two other members of the City Council would have had to vote to hire Guido. RT1 at 38:19-22. There was no evidence that any of the other four members of the City Council would have voted to hire Guido. To the contrary, 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 the rest of the City Council members ... were not familiar with Mr. Guido ... the plan was to appoint somebody ... as an acting interim, and then to look for other avenues.” RT1 at 47:15-48:11.

Thus, the City Council began the normal competitive process. Mayor Yu testified about a multi-stage hiring process 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. RT1 at 42:23-43:19. There was no evidence that Guido would have moved on through any of these stages, much less that he would have been chosen over the other 18-20 candidates who had applied.

Given Guido’s failure to prove he would have been hired into a CalPERS-eligible job, his alleged reasonable reliance on the inaccurate information he received from CalPERS cannot be based on his claimed decision not to take a CalPERS-eligible job.

B. As A Matter Of Law, Estoppel Should Not Be Available To Guido

1. Estoppel may not be applied to expand statutory rights

Estoppel is not available to Guido as a matter of law because “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; see also, *Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886, 893 (“principles of estoppel are not invoked to contravene statutes and constitutional provisions that define an agency’s powers.”); *Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1608 (“While equitable relief is flexible and expanding, its power cannot be intruded in matters that are plain and fully covered by positive statute.”)

In *Medina, supra*, 112 Cal.App.4th 864, for over ten years, members of a county retirement system relied on communications from the system stating that they were entitled to “safety” status. Indeed, they had made higher contributions to the retirement system based on that “safety” status. Those members could have pursued a different job, but they allegedly remained in their non-“safety” jobs for over a decade based on the communications from the retirement system stating that they qualified for “safety” status. The court held, however, that equitable estoppel was not available to those members, because “estoppel is barred where the government agency to be estopped does not possess the authority to do what it appeared to be doing.” *Id.* at 870.

Just like in *Medina*, CalPERS’ staff can only calculate members’ pensions in compliance with the PERL and therefore CalPERS’ staff “does not possess the authority” to calculate members’ pensions in amounts that are greater than what is provided for under the PERL. *Id.*

Just last year, the First District Court of Appeal resolved any doubt on the question of whether estoppel can be applied to expand a CalPERS member’s rights under the PERL. In *City of Pleasanton, supra*, 211 Cal.App.4th 522, the court explained: “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 543. The Board should similarly find that estoppel is “barred as a matter of law” in the present case.

2. The cases Guido relies upon are not on point

Guido relies on *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, but *Crumpler* is materially distinguishable. The court’s conclusion in *Crumpler* appears to have been based on that court’s view that the classification issue in that case (*i.e.*, whether the public employees were “miscellaneous” or “safety” members) involved some exercise of discretion or judgment by the CalPERS Board. Thus, the court held that “in view of the statutory powers conferred on the board by section 20124 [now 20125], this is not a case where the government agency utterly lacks the power to effect that which an estoppel against it would accomplish.” *Id.* at 584. Here, the eligibility requirements of PERL section 20638 are clearly stated and do not require any exercise of judgment or discretion by the Board or CalPERS staff. The Board and staff must

follow that clearly stated law.

Guido also relies on *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, but the unique facts in *Mansell* render it inapplicable here. In *Mansell*, the City of Long Beach sought a “writ of mandate commanding its city manager and city clerk to execute and put into effect certain agreements designed to resolve title and boundary problems in the Alamitos Bay area.” *Id.* at 467. The dispute in *Mansell* arose after a combination of factors cast a cloud on the title to the dry land bordering the bay. *Id.* To resolve the dispute, the Legislature enacted chapter 1688 “disclaiming state and other public interest in certain described lands . . . and authoriz[ed] the settlement of certain boundary questions.” *Id.* After years of negotiation, two agreements were completed to carry out the purposes of the legislation. *Id.* The City Manager and City Clerk of Long Beach, however, refused to execute the agreements because they believed that they were contrary to constitutional and common law prohibitions against the alienation of state-owned tidelands and submerged lands. *Id.*

One of the City of Long Beach’s arguments was that the state and city were estopped from reclaiming the land bordering the Alamitos Bay area because the city had exercised full municipal jurisdiction over the area since 1923. *Id.* at 487. During that time, it had granted building permits, approved subdivision maps, constructed and maintained streets and city services and had collected taxes. *Id.* As a result, the City argued that equitable estoppel should prevent the state and city from asserting paramount title to the land. *Id.* The California Supreme Court agreed, finding that it was 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). In *Mansell*, the state and the city had conducted themselves as though the land in question was private property wholly free from trust claims for over forty-seven years. *Id.* at 499. In reliance on this conduct, thousands of citizens had settled on the land. *Id.* As a result, 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.*

In *Mansell*, the Court emphasized that “the rare combination of government conduct and extensive reliance here involved will create an extremely narrow precedent for application in future cases.” *Mansell, supra*, 3 Cal.3d at 500. Further, 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. Put simply, Guido’s case is not a “rare,” “special,” “unusual,” “exceptional,” “unique” or “extraordinary” case, like *Mansell*.

Guido also relies on *Hittle v. Santa Barbara County Employees' Retirement Assn.* (1985) 39 Cal.3d 374, and *Welch v. California State Teachers' Retirement Bd.* (2012) 203 Cal.App.4th 1, but *Hittle* and *Welch* are not on point. The word "estoppel" does not even appear in those opinions and those courts certainly were not applying estoppel to expand substantive statutory rights. In both *Hittle* and *Welch*, the members were eligible to apply for a disability retirement benefits and only failed to take the procedural steps necessary to apply for those benefits, because the retirement systems inaccurately told them they were not eligible.

3. The balance of equities weighs in favor of not applying estoppel

As previously noted, in *Mansell*, the Court emphasized that "the rare combination of government conduct and extensive reliance here involved will create an extremely narrow precedent for application in future cases." *Mansell, supra*, 3 Cal.3d at 500.

In contrast, applying estoppel to the present case could set a dangerously broad precedent. Retirement law is highly complex and CalPERS administers contributions and benefits for over 1.6 million active and retired public employees. CalPERS' systems are designed to implement the law, but no system is perfect, particularly when a complex statutory scheme must be administered for 1.6 million members who all have different circumstances that may impact their retirement rights. All CalPERS members, in theory, have options to pursue other employment and may well make different decisions about which jobs to pursue and when to pursue them if the facts turn out to be different than they may have believed for a time based on inaccurate information they received from CalPERS. Thus, applying estoppel to expand members' rights under the PERL could cause members' rights to not be governed by the PERL at all, but rather by how far the errors of the imperfect human beings and computer systems administering CalPERS extend.

Further, the benefits Guido seeks are "windfall" benefits that were the product of a loophole that should have never existed. In 1993, Senate Bill 53 was a substantial legislative overhaul of the PERL, which came about "in response to the recently uncovered, but apparently widely used, practice of 'spiking' (intentional inflation) the final 'compensation' (upon which retirement benefits are based) of employees of [Cal]PERS local contracting agencies." Legislative History ("LH") 88 (the Legislative History is attached to CalPERS' Request for Official Notice in the record). The Legislative History explained: "This bill is intended to address the issue of pension abuse/spiking by public employees who are members of PERS by clarifying the compensation base upon which benefits are calculated and assuring that benefits are actuarially funded over the career of employees." LH 101. One form of spiking that SB 53 addressed was the kind of spiking that Guido seeks here. The Legislature found it necessary to "eliminate windfall benefits to certain elected or appointed board/council members who can now receive full-time PERS credit for monthly meetings." LH at 90 (emphasis added).

In theory, because Guido's elected service occurred before the Legislature closed the loophole, he could have obtained the benefits he seeks if he had been hired into a CalPERS-eligible job at full-time pay. But he was not hired into a CalPERS-eligible job at full-time pay. Just because windfall benefits theoretically may have been available to Guido, that does not mean that the Board should award those benefits under a theory of

equitable estoppel. The City of Cudahy made contributions on Guido's \$150 per month pay when he was a member of the City Council. RT1 at 190:4-15. Guido contributed only \$821.41 in member contributions to fund the benefits he seeks from CalPERS. RT1 at 186:14-21. He now seeks a retirement allowance of about \$40,000 per year (plus cost of living adjustments) for the rest of his life.

Put simply, applying equitable estoppel here would not be equitable.

C. Guido's Other Theories Do Not Save His Defective Estoppel Claim

In the hearing before the ALJ, Guido asserted several other alternative theories that the ALJ did not address in his Proposed Decision, due to the ALJ's finding regarding equitable estoppel. To the extent Guido continues to assert these alternative theories, CalPERS staff respectfully submits that the Board should reject them.

Statute of limitations and laches defenses are "fish out of water" in this case. They might have applied against Guido if he had delayed filing his administrative appeal, but they have no potential application to CalPERS, which is responding to that appeal. Further, just like estoppel, "laches is not available where it would nullify an important policy adopted for the benefit of the public." *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381.

As for the Board's fiduciary duties and its correction statute (PERL section 20160, *et seq.*) the Board is required to bring members' benefits into compliance with the PERL. Under PERL section 20160(a)(3), CalPERS is authorized to correct errors or omissions of members, contracting agencies, or itself, but not to provide the party seeking correction with a "status, right, or obligation not otherwise available" under the PERL. Indeed, the Court in *City of Pleasanton, supra*, 211 Cal.App.4th at 544, explained: "In our view, Linhart's breach of fiduciary duty theory is simply a way of restating his equitable estoppel claim, which we have already found is barred as a matter of law." The Court further explained: "PERS has a duty to follow the law." *Id.* As another court explained, a retirement board "cannot fulfill this [constitutional and fiduciary] mandate unless it investigates applications and pays benefits only to those members who are eligible for them." *McIntyre v. Santa Barbara County Employees' Ret. Sys.* (2001) 91 Cal.App.4th 730, 734.

VI. CONCLUSION

For the foregoing reasons, CalPERS staff respectfully requests that the Board deny Fred Guido's appeal.

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