

ATTACHMENT B
RESPONDENT'S ARGUMENT

Attachment B
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December 5, 2013

To: The CalPERS Board of Administration:
Board President Feckner
Board Vice President Diehr
Board Members Bilbrey, Chapman, Chiang, Costigan, Jelincic, Jones, Lind, Lockyer,
Mathur and Slaton

Re: Full Board Hearing Re the Matter of the Application to Establish Reciprocity:
FRED GUIDO and CITY OF CUDAHY, Respondents
CalPERS Case No. 9711, OAH Case No. 2012030387
Board Hearing: December 18, 2013, at 9:00 am

President Feckner, Vice President Diehr, and Members of the Board of Administration:

On October 16, 2013, the CalPERS Board of Administration declined to adopt the *Proposed Decision* prepared by Administrative Law Judge Eric Sawyer in the above-captioned administrative proceeding, and voted instead to conduct its own hearing on the matter.

That hearing is scheduled for December 18, 2013. I will be appearing at the hearing on behalf of Respondent Fred Guido.

Pursuant to the October 24, 2013 letter to me from Wesley Kennedy of the CalPERS Legal Office, together with the Notice of Hearing and other attachments, I am offering this written argument in advance of the hearing. I will also present oral argument at the hearing itself.

Attached please find RESPONDENT'S ARGUMENT which sets forth an outline of the issues I contend the Board must consider in deciding this matter.

I will present the arguments in more detail at the hearing itself, but offer this RESPONDENT'S ARGUMENT so that the Board may consider Respondent Guido's position in advance of the hearing.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Michael Jensen".

John Michael Jensen

JMJ:gm
Enclosure

RESPONDENT'S ARGUMENT

I. Issues in This Hearing:

The core issues in this matter concern the doctrine of equitable estoppel and its application to CalPERS. Underlying this case is CalPERS' duties to provide accurate, reliable information to its members that they can use to plan their lives.

CalPERS has adopted an affirmative duty to give information to its members that is sufficiently reliable to enable those members to make good choices. CalPERS' constitutional and statutory mandate is to put the interests of Members over any other duty. (Cal.Const., art. XVI, §17; *Government Code*, §20151.) CalPERS "owes a fiduciary duty to provide timely and accurate information to its Members. (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 40.) CalPERS' own precedential decision holds that "[t]he duty to inform and deal fairly with members also requires that the information conveyed be complete and unambiguous." (*In re Application of Smith* (March 31, 1999) PERS Prec. Dec. No. 99-01.)

Because members put great trust in CalPERS, they often make detailed requests about their pension rights and benefits over many years – issues that only CalPERS can provide reliable information about. Based on the information provided by CalPERS, members make important decisions over many years involving their employment options, careers, family well-being, investments, and eventual retirement.

It is unavoidable that an institution as large as CalPERS will occasionally make mistakes in the advice provided to its one and one-half million members and their beneficiaries. Respondent Fred Guido is not demanding perfection. The issue posed by this case is much narrower and rare:

Should a member be entitled to rely on information that CalPERS leads them to believe is correct for years, after many requests, with the result that the member retires based specifically on that information? Can CalPERS after that retirement renege on its promises and force the member to suffer the consequences, bear the loss or burden alone?

In particular, does CalPERS' repeated, long-standing and systemic wrongful advice to Guido and its assurances that he had established reciprocity between his CalPERS and LACERA service rise to the level where CalPERS should be estopped from *denying* reciprocity years after that advice and *after* Guido had retired from both CalPERS and LACERA, too late for him to "rewind" his life and make different decisions?

Respondent submits that "this case presents one of those exceptional conditions in which estoppel against a governmental agency is justified and should be applied." (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 495.) CalPERS' legal counsel pointed out in their closing brief to Administrative Law Judge Eric Sawyer that estoppel should only be applied against the government in "special," "unusual," "exceptional," "unique" or "extraordinary" circumstances. Guido's claim is precisely that.

II. Standard On Review:

The Board has declined to adopt the ALJ's *Proposed Decision* and to instead conduct its own hearing on the matter. Pursuant to *Government Code* sections 11517 and 20120 and the "Statement of Policy and Procedures: Procedure for Full Hearings Before the Board" which has been adopted by the Board based upon those two statutes, the Board will decide the matter based upon the administrative record. Respondent Guido and CalPERS staff shall be permitted to make arguments of law, as well as the application of law to the factual findings in the administrative record, but no witness testimony will be permitted.

A. Standard for Findings of Fact:

Respondent has made no request that the Board permit the introduction of additional evidence, and to his knowledge neither has CalPERS staff. Therefore, the Board's decision must be based on the documentary and testimonial evidence received by the ALJ. "The statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence." (*Government Code*, §11425.50(c).)

While the Board is authorized to consider the administrative record and make its own findings of fact that differ from those findings made by the ALJ, it must do so without the prejudicial abuse of its discretion or it subjects itself to judicial oversight pursuant to writ of administrative mandamus. (*Code of Civil Procedure*, §1094.5.)

B. Standard for Legal Conclusions:

The Board is authorized to make its own *de novo* review of the law and its application to the facts in the matter. However, Guido respectfully requests that the Board consider the very careful presentation of public policy, the PERL statutes, constitutional case law, equitable estoppel, and agency liability in the *Proposed Decision*.

If the Board has questions regarding the law and its interpretation set forth in the *Proposed Decision*, Guido encourages the Board to request an independent opinion from the California Attorney General's Office. He expects that it will support ALJ Sawyer's reasoning.

C. Standard for Facts and Determination of Witness Credibility:

Since the Board will decide the matter based upon the administrative record and no witness testimony will be permitted, it follows that the Board shall afford great deference to the ALJ's findings concerning the credibility of witness testimony at the administrative hearing presided over by the ALJ.

Evidence Code section 780 sets forth the following concerning a determination of the credibility or non-credibility of witness testimony by the finder of fact:

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- (a) His demeanor while testifying and the manner in which he testifies.
 - (b) The character of his testimony.
 - (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
 - (d) The extent of his opportunity to perceive any matter about which he testifies.
 - (e) His character for honesty or veracity or their opposites.
 - (f) The existence or nonexistence of a bias, interest, or other motive.
 - (g) A statement previously made by him that is consistent with his testimony at the hearing.
 - (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
 - (i) The existence or nonexistence of any fact testified to by him.
 - (j) His attitude toward the action in which he testifies or toward the giving of testimony.
 - (k) His admission of untruthfulness.
- (Evidence Code, §780.)*

All of the foregoing criteria require the trier of fact to consider and evaluate the "live" testimony as it is given. Inasmuch as the Board has declined to hear any witness testimony and to rely on the administrative record, The Board must also defer to the findings of the ALJ on these credibility issues.

Further, the Administrative Procedures Act mandates that "[i]f the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it..." (*Government Code*, §11425.50(b).)

Therefore, if the Board rejects the credibility findings of the ALJ or rejects facts determined by the ALJ, The Board must articulate the specific evidence that forms the basis for rejecting the credibility determinations or the facts determined by the ALJ. The law requires that the Board articulate specific evidence detailing why the facts or the credibility determination of the ALJ were not supported by the record. The Board must set forth those matters in the record that support the Board's contrary factual or credibility findings.

III. Elements of Equitable Estoppel:

The law of equitable estoppel is largely determined by court decisions, including those of the California Supreme Court.

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. (*Mansell, supra*, at 489.)

Mansell qualifies that "an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public,' [Citation]" (*Mansell, supra*, at 493), but explicitly states that "[t]he doctrine of equitable estoppel may be applied against the government where justice and right require it [citations omitted]" and summarizes that "[t]he tension between these twin principles makes up the doctrinal context in which concrete cases are decided." (*Mansell, supra*, at 493, emphasis added.)

In other words, courts must *balance* the appropriateness of estoppel against the government by weighing a "strong rule of policy, adopted for the benefit of the public" against situations "where justice and right require" estoppel. *Mansell* clarifies that there are "exceptional cases" where estoppel is *very much appropriate*.

IV. Facts of Claim

The *Proposed Decision* recounts in detail how CalPERS repeatedly and consistently told Guido over many years of his employment that he had established reciprocity. Guido had no reason to believe that CalPERS' information was wrong. Guido relied on CalPERS' information in planning for and taking his retirement, leading him to rely on that information until it was too late for him to do anything else. The *Proposed Decision* details the pervasive, continual nature of CalPERS' advice and Guido's reliance, which are summarized briefly as follows:

- In 2003, Guido began thinking of possible future retirement and contacted CalPERS to find out how to "marry" the service between the two retirement systems to maximize his pension allowance. He asked what steps he would need to take to establish reciprocity, including the possibility of leaving LACERA employment and obtaining a job with a CalPERS agency. (*Factual Findings*, Nos. 18-19.)
 - The CalPERS representative said she thought he had *already* established reciprocity, but would research it further and send him definitive word in writing.
 - Soon after that Guido received a letter from CalPERS which explicitly said that CalPERS had reviewed his account, determined that reciprocity had been established between his CalPERS and LACERA service, and said he had the right to retire based on his highest earnings in either system so long as he retired from both on the same date. (*Factual Findings*, No. 26.)
 - CalPERS provided Guido with a retirement estimate in October 2003 utilizing his \$10,000 LACERA highest compensation figure, confirming reciprocity in fact. (*Factual Findings*, No. 21.)
 - During the same period, Guido consulted with Michael Henry, LA County's Human Resources Director, about possible new jobs. Henry was prepared to help Guido find a County job with CalPERS coverage if necessary to help him establish reciprocity. (*Factual*

Findings, No. 25.)

- Based on CalPERS' representation that Guido already had reciprocity, Guido told Henry that he had established reciprocity. Guido declined Henry's offer to find him a CalPERS-covered position (that would have established reciprocity) and instead took another LACERA-covered job. (*Factual Findings, No. 26.*)

- In 2007, Guido requested and received another retirement estimate from CalPERS that again utilized his LACERA compensation figure. (*Factual Findings, Nos. 27-28.*)

- As he approached retirement, Guido asked CalPERS to provide him with an official retirement estimate. CalPERS responded by letter in October 2008 which reiterated that he had established reciprocity and provided a retirement estimate utilizing his LACERA highest compensation figure. (*Factual Findings, No. 29.*)

- Guido retired in reliance on CalPERS' long-standing representations. On April 7, 2009, Guido filed his retirement application with the CalPERS regional office in Glendale, indicating that he was retiring simultaneously from CalPERS and LACERA. A CalPERS representative reviewed his application, consulted Guido's electronic file in the CalPERS database, and confirmed that reciprocity had been established. (*Factual Findings, Nos. 31-32.*) He counted on receiving the pension allowance CalPERS promised him as part of those representations.

- After filing both his CalPERS and LACERA retirement applications but before his actual retirement date, Guido was approached by an elected official about possibly taking an executive-level position with Temple City, a CalPERS-contracting agency. Guido, however, declined any interest in the position in large part because he believed he had already established reciprocity. (*Factual Findings, Nos. 34-35.*)

- However, at least weeks prior to Guido's retirement, CalPERS' staff knew or should have known that reciprocity was not established. Unbeknownst to Guido, representatives of LACERA and CalPERS spoke by phone on May 18, 2009, two weeks before Guido's chosen retirement date, and definitively determined that he had not established reciprocity between the two systems. Further, the CalPERS representative conclusively determined *before* Guido's retirement that he had been systematically misinformed for years and made a note of this in Guido's file. Nevertheless, CalPERS again did not tell Guido that he had not established reciprocity (when he still had time to act on it). Unaware, Guido went forward with his retirement as planned. (*Factual Findings, No. 37.*)

- Although CalPERS staff knew that Guido was scheduled to retire in two (2) weeks from both systems, irrevocably setting him on a course headed for shipwreck, CalPERS staff *did absolutely nothing* to inform or communicate to Guido for six (6) weeks.

- Weeks *after* Guido's retirement, CalPERS cavalierly informed him that he did not in fact have reciprocity. Weeks after retirement, CalPERS staff told Guido that he would receive about \$3,000 per month less than he had been told he would receive – money he without question had relied on when planning his retirement. (*Factual Findings, No. 41.*)

V. CalPERS' Errors Concerning Reciprocity Advice

Guido relied for years on CalPERS' specific advice to him about an important benefit. Guido's detrimental reliance on CalPERS' assurance of the establishment of reciprocity warrants imposition of estoppel. CalPERS' misrepresentations to Guido were of a serious nature, frequency and duration about important rights.

At the hearing, CalPERS' "person most knowledgeable" ("PMK") about reciprocity testified that reciprocity is an important benefit to Members and could have significant financial impact. She agreed that it would be important to correctly inform Members about their reciprocity status before they retired. (*Factual Findings*, No. 47.)

The PMK, however, freely admitted that CalPERS failed to conduct the investigation necessary to establish whether Members asking about reciprocity had established it, and that it regularly *misinformed* Members over many years that they had established reciprocity when they had not. (*Factual Findings*, No. 48.) The PMK testified that she established a new protocol after becoming head of the Retirement Estimate Unit to make sure reciprocity was actually confirmed before Members were told it had been established (*Factual Findings*, No. 48), but acknowledged that staff failed to follow the new protocol and had *continued* misinforming Members.

Although the PMK testified that she had access to the searchable CalPERS Customer Touch Point database which could have been utilized to identify Members who had sought information or advice about reciprocity, she said neither she nor anyone in her department had done so. (*Factual Findings*, No. 51.) The ALJ also noted that CalPERS could have issued a notice in Members' annual statements asking them to contact CalPERS about reciprocity determinations but did not. (*Legal Conclusions*, No. 8C.)

In short, when CalPERS had the knowledge and opportunity to correct its errors in a way that Members could effectively change their retirement planning, CalPERS did nothing to correct the false information that it had provided to Members that reciprocity was established. Guido's situation was no fluke, but the logical outcome of a policy and practice by CalPERS of callously ignoring its fiduciary duty to "provide timely and *accurately* information to its Members". (*City of Oakland, supra.*) CalPERS has still not corrected the false impression and inaccurate information about reciprocity that staff provided to many Members.

VI. Applicable Law Governing Estoppel

CalPERS' legal staff argued in this case that estoppel can never apply to CalPERS, no matter how long it has misinformed a Member or how egregious that misrepresentation has been, so long as CalPERS can point to some element of the statutory law in the PERL allegedly justifying CalPERS' actions. Indeed, CalPERS' legal staff has made the same argument in other cases. Judge Sawyer systematically examined and rejected the legal basis of each of CalPERS' legal arguments, summarized briefly as follows:

- Judge Sawyer identified the pivotal issue as whether estoppel is available against government entities like CalPERS, referencing CalPERS' reliance on *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 for the proposition 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, supra*, at 870.) As Judge Sawyer pointed out, both cases are vastly different.
- The *Medina* opinion is not authority to deny estoppel in this case. The *Medina* court denied estoppel after finding that the Los Angeles County Employees' Retirement

Association board lacked authority to classify plaintiffs as safety officers when they performed no safety duties. As the *Proposed Decision* points out, however, Section 20125 of the PERL grants the CalPERS Board authority to "judge ... conditions under which persons may be admitted to and continue to receive benefits under this system." Forty years ago the appellate court in *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567 imposed estoppel against CalPERS, citing to that precise code section.

- The *City of Pleasanton* opinion is not authority to deny estoppel in this case. In *City of Pleasanton*, plaintiff was denied credit for standby pay because he could cite no statutory authority to include it in pensionable compensation. As the *Proposed Decision* notes, by contrast, Section 20039 permitted Guido to increase his final compensation in CalPERS simply by finding a CalPERS-contracting job – something he testified he was prepared to do but for CalPERS' assurance that he had reciprocity.

- The Supreme Court decision in *Mansell* authorizes estoppel in this case. Judge Sawyer pointed out that the Supreme Court in *Mansell, supra*, ruled that even without statutory authority, "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.'" (*Legal Conclusions*, No. 8A, quoting *Mansell*.)

- Judge Sawyer recounted (i) the repeated representations to Guido that he had reciprocity, (ii) CalPERS staff's actual knowledge that misrepresentations on reciprocity were not accurate, (iii) CalPERS staff's failure to do anything to identify the misinformed Members; (iv) CalPERS staff's failure to correct the false information, (v) CalPERS staff's explicit knowledge *prior* to Guido's retirement that Guido had not in fact established reciprocity but (v) CalPERS staff's failure to inform him until a month after he retired (and after it was too late for Guido to effectively correct his career choices). (*Legal Conclusions*, No. 8C.) Judge Sawyer found that all this "is such that fraud would result if an estoppel were not raised." (*Ibid*.)

- The *Proposed Decision* notes that estoppel would be available to a much smaller number of CalPERS Members than claimed (*Legal Conclusions*, No. 8D) and dismisses the argument that granting estoppel to Guido would be against public interest because CalPERS is funded by public tax payers, noting that the same would apply to any government entity (*Legal Conclusions*, No. 8E).

Finally, the *Proposed Decision* rejects CalPERS' claim that the equities tip against Guido because he is seeking an alleged "windfall", noting (a) that the Legislature explicitly allowed the benefits Guido seeks under Section 20039, benefits he would have every right to claim under reciprocity had CalPERS simply given him accurate information and afforded him the opportunity to take a CalPERS-covered job, and (b) CalPERS' actions were such that "[i]f this case supports a public policy or interest, it is that when the government systematically 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." (*Legal Conclusions*, No. 8F.)

VII. Guido Satisfies All Elements of Estoppel:

Factually and legally, Guido satisfies all four elements of estoppel: (1) CalPERS knew or should have known there was a discrepancy between the reciprocity requirement and the information that it provided Guido that reciprocity was established; (2) CalPERS either intended this representation (its failure to identify this discrepancy) be relied upon, or Guido had the right to believe it was so intended; (3) Guido was ignorant of the discrepancy; and (4) Guido relied upon the conduct of CalPERS in making his retirement plans to Guido's injury. (See *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.)

Again, the Board must give great deference to the ALJ's findings concerning the credibility of the testimony of Guido and other witnesses which led to the Factual Findings set forth in the *Proposed Decision*. If the Board finds otherwise, it must set forth the evidence in the administrative record which supports a contrary finding. (*Government Code*, §11425.50(b).) There is no evidence that supports a contrary finding.

VIII. Conclusion

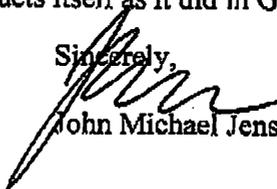
In a fair and unbiased interpretation of existing law, ALJ Sawyer carefully examined each of CalPERS' arguments, found them unpersuasive, and rejected them. In detail, Judge Sawyer's *Proposed Decision* meticulously considers the nature and application of equitable estoppel, the elements of estoppel, and conclusively finds that estoppel *is* available against CalPERS. (*Legal Conclusions*, Nos. 7-8.) As part of his ruling, Judge Sawyer finds that the number of cases where estoppel would apply is likely quite small, but that they do exist and similar interpretations of the law would apply.

As far as whether equitable estoppel can be applied, the Board should consider the following logic: does CalPERS have the authority to grant reciprocity at all? The answer is clearly yes. Did CalPERS inform Guido and others that they had established reciprocity? The answer is yes. Did Guido rely on it? The factual finding is yes. If Guido had known that he had not established reciprocity, would he have taken a CalPERS job and established reciprocity? The factual finding is yes. If that course had been taken, there would be no issue before you on appeal. Guido would have reciprocity. But because CalPERS misinformed Guido while at the same time CalPERS has the authority to establish reciprocity at that time, then it is appropriate to grant Guido the benefit of reciprocity under equitable estoppel.

Although popularly stated in movies and elsewhere, the saying "With great authority comes great responsibility" applies directly to the Board here. Rather than limiting CalPERS authority, the attached *Proposed Decision* wisely and legally implements CalPERS' authority.

Finding in Guido's favor would also give the Board the opportunity to ensure that CalPERS' employees take greater care to advise membership correctly. Although limited and rare, estoppel *can* apply against CalPERS when it conducts itself as it did in Guido's case.

Sincerely,


John Michael Jensen

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DATE: December 2, 2013

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Re: In the Matter of Fred Guido and the City of Cudahy, Respondents
OAH CASE NO. 2012030387

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