BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of Applicability of Government Code Section 20638 to Member Fred Guido:	Case No. 9711
FRED GUIDO,	OAH No. 2012030387
Respondent,	**ORDER RE: PETITIONER CALPERS' REQUEST FOR OFFICIAL NOTICE AND RESPONDENT GUIDO'S MOTION TO STRIKE**
CITY OF CUDAHY,	
Respondent.	

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

Jeffrey R. Rieger, Esq., represented Petitioner CalPERS. John Michael Jensen, Esq., represented Respondent Fred Guido. Juanda Lowder Daniel, Esq., represented Respondent City of Cudahy. Ms. Daniel has been subsequent replaced by Christine Hsu, Esq.

The record remained open after the conclusion of the hearing for the parties to submit closing argument by way of briefs. Respondent Guido timely submitted his brief. Petitioner CalPERS timely submitted its brief. Respondent City of Cudahy filed a joinder to CalPERS' brief.

Petitioner CalPERS also submitted a Request for Official Notice of the Legislative History of Senate Bill 53 (1993-1994), including a declaration of the person who performed the legislative search and a CD containing a PDF copy of the entire 985-page Legislative History.

In response, Respondent Guido filed a Motion to Strike the Request for Official Notice, as well as the citations to the same in CalPERS' brief.

Petitioner CalPERS shall have one week from the date of this order to file an opposition, if any, to the Motion to Strike. Respondent Guido shall not file a reply. The ALJ shall thereafter issue an order regarding the Request for Official Notice, the Motion to Strike, as well as establish a new deadline for Respondent Guido to submit his reply to CalPERS' closing brief.

EXHIBIT
A

IT IS SO ORDERED.

DATED: July 11, 2013

ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings

DECLARATION OF SERVICE

Case Name: Guido, Fred **OAH No.: 2012030387**

I, Tasha Rowland, declare as follows: I am over 18 years of age and am not a party to this action. I am employed by the Office of Administrative Hearings. My business address is 320 West Fourth Street, Suite 630, Los Angeles, CA 90013. On April 03, 2013, I served a copy of the following document(s) in the action entitled above:

ORDER RE: PETITIONER CALPERS REQUEST FOR OFFICIAL NOTICE AND RESPONDENT GUIDO'S MOTION TO STRIKE

to each of the person(s) named below at the addresses listed after each name by the following method(s):

John M. Jensen
Attorney at Law
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☒ **Fax Transmission.** Based upon agreement of the parties to accept service by fax transmission, I personally transmitted the above-described document(s) to the person(s) at the fax number(s) listed above, from fax machine number (916) 376-6324, pursuant to Government Code section 11440.20 and California Code of Regulations, title 1, section 1008, subdivision (d).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration was executed at Los Angeles, California on April 03, 2013.

/s/
Tasha Rowland, Declarant

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JOHN MICHAEL JENSEN, State Bar No. 176813
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11500 West Olympic Blvd Suite 550
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Attorneys for Respondent Fred Guido

BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of Applicability of Government Code Section 20638 to Member Fred Guido FRED GUIDO, Respondent, and CITY OF CUDAHY, Respondent.	**CALPERS CASE NO. 9711** **OAH CASE NO. 2012030387** **FRED GUIDO'S NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF CALPERS' *POST-HEARING BRIEF* AND ALL OF CALPERS' *REQUEST FOR OFFICIAL NOTICE*; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** OAH Hearing: November 13-15, 2012 Hearing Location: Los Angeles OAH Presiding ALJ: Eric Sawyer

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that Respondent Fred Guido hereby moves the Office of Administrative Hearings, pursuant to *Code of Civil Procedure* sections 435 through 437, for an Order striking (1) portions of *CalPERS' Post-Hearing Brief* and (2) CalPERS' entire *Request for Official Notice*, both filed with the OAH on March 22, 2013, on the grounds that the designated portions of the *Brief* and the entire *RJN* are irrelevant, improper, highly prejudicial, and contribute nothing regarding the legal matters at issue.

The specific sections of the *CalPERS Post-Hearing Brief* that Guido seeks to strike, and the grounds for issuance of an Order striking those designated portions and the entire *RJN*, are

set forth and discussed in greater detail in the attached Memorandum in Support.

Respectfully submitted,

Dated: March 29, 2013

By: _____
John Michael Jensen,
Attorney for Respondent Fred Guido

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MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

INTRODUCTION

CalPERS has attempted to fill the administrative record with irrelevant, highly prejudicial material unrelated to the legal issues brought forward by CalPERS. Guido moves to strike the inappropriate material in CalPERS' *Post-Hearing Brief* and it its *Request for Judicial Notice*.

Specifically, Respondent Fred Guido seeks an Order from the Administrative Law Judge, pursuant to *Code of Civil Procedure* sections 435 through 437, striking portions of *CalPERS' Post-Hearing Brief* and its entire *Request for Official Notice*. Both documents were filed with the OAH on March 22, 2013. The designated portions of the *Brief* and the entire *RJN* are irrelevant, improper, highly prejudicial, inapplicable, and contribute nothing appropriate to the elegal issues presented by CalPERS in its *Statement of Issues*. They are simply extraneous prejudicial political statement about other situations.

Explicitly, Guido requests that the ALJ strike and disregard the following:

A. CalPERS' Post-Hearing Brief

1. Page 1, lines 10-20;
2. Page1, line 22, the words "historical loophole";
3. Page 17, line 12, through page 18, line 21; and
4. Page 18, line 25, the words "the windfall".

B. CalPERS' Request for Official Notice

5. The entirety of CalPERS' Request for Official Notice of the legislative history of Senate Bill 53 (1993-1994).

LAW AND ARGUMENT

I. Highly Prejudicial Political Statements

CalPERS offers various statements and legislative history unrelated to the legal matters in dispute in this case. CalPERS did not raise these matters in its initial pleadings and did not argue the effect or existence of these matters in the hearing. They are not before the Court.

While in some very vague worldview "everything may ultimately be political", in this case the Court was presented with specific legal issues about reciprocity and equitable estoppel. The material that CalPERS is attempting to introduce is irrelevant to both of those issues.

II. Not Properly in Dispute, Not Noticed, Irrelevant

CalPERS' *RJN* seeks official notice of the legislative history of Senate Bill 53 (1993-1994) which eventually became *Government Code* section 20039 (though never identified as such by CalPERS). CalPERS' *Post-Hearing Brief* contains repeated irrelevant references to that history and to the effects of Section 20039.

CalPERS is attempting to inappropriately introduce arguments and raise issues that were not properly identified or noticed in the pleadings. These issues (if they are issues) were never brought up in the *Statement of Issues* or the OAH hearing.

They are irrevant to the dispute and have no bearing on the matters that CalPERS put in issue in these proceedings in its *Statement of Issues*. The *Statement of Issues* categorically states:

> **ISSUE FOR DETERMINATION**
>
> This Appeal is limited to the issue of whether 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 CalPERS, pursuant to *Government Code* section 20638.

Further, the only issues discussed at the hearing and in all briefing prior to CalPERS' *Post-Hearing Brief* deal exclusively with the question of whether Guido believed he had established reciprocity between his CalPERS and LACERA time and whether CalPERS should be estopped from denying its representations that he had.

CalPERS is the party that convened the OAH hearing when it issued its *Statement of Issues* and *Notice of Hearing*. If CalPERS wished to have the matters in the designated portions of its *Post-Hearing Brief* and the materials in its *RJN* considered in the proceedings, it should have timely raised and addressed them earlier in the case, for example in the *Statement of Issues*. It did not do so, and should be estopped and barred from introducing them now. At this point, Guido has no opportunity to contest them in the OAH hearing.

Code of Civil Procedure section 436(a) permits the Court to strike "irrelevant" matters from any pleading. The material described above meets that description because it has no bearing issues in these proceedings. The material should be stricken and not considered by the ALJ in his *Proposed Decision.*

III. CalPERS Includes the Improper Material To Prejudice Guido

CalPERS' improper discussion of the legislative history of Senate Bill 53 and the effects of the enacted statute are designed simply to malign Guido with repeated references to "windfall", "pension spiking", "loophole" and similar phrases.

It would be comparable to Guido asking the OAH to take judicial notice of the fact that former CalPERS officials Federico Buenrostro and Alfred Villalobos were recently indicted on mail and wire fraud and obstruction of justice charges.

IV. Legal Issues in This Case, Existing Law

The PERL explicitly permits Guido (who served on the Cudahy City Council from 1970 to 1982) to have his pension allowance calculated as a product of his highest qualifying CalPERS 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.

Subsequently enacted law is irrelevant. It does not matter that the Legislature added new statutory language effective in 1994 barring that for those beginning their elected local service after that time. The new law did not change retroactive rights. The new law specifically permitted those elected prior to that time to receive pension benefits under the old structure. CalPERS prejudicially, coyly and without any evidence or support suggests that this was done "presumably to avoid costly litigation". But the fact is that the Legislature considered service rendered up to that point to be vested under the old arrangements. That is the law (not a "loophole").

If CalPERS has issues with the Legislature's course of action, it is free to introduce legislation changing the law. However, such a change is unlikely to be constitutional or otherwise acceptable.

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Since the law is the law, CalPERS' reference to it as a "loophole" is simply disrespectful of the Legislature, trying to substitute CalPERS' opinion for the actual action of the Legislature.

It is improper for CalPERS to cast aspersions on the results of the law and argue its interpretation for no other purpose than to prejudice the rights of Guido.

CalPERS has apparently included the references to the legislative changes and to "windfall", "spiking" and "loophole" to convince the ALJ that even if he finds that Guido has established his estoppel and related claims, he should deny Guido the benefit of that finding because Guido is not "deserving" of his statutory rights. But that is not following or respecting the law, that is violating the separation of powers and inappropriate. It is not proper legal argument to tell a judge not to follow the law.

Code of Civil Procedure section 436(a) permits the Court to strike "improper" matters from any pleading. The material described above meets that description and should be stricken and not considered in the determination of the matters in this proceeding.

CONCLUSION

The material referenced by CalPERS concerning the legislative history of Senate Bill 53 (1993-1994) and its repeated references to alleged "windfalls", "pension spiking" and "loopholes" are irrelevant to the subject matter before the OAH, contribute nothing to the resolution of the issues that are at issue, are highly prejudicial, and are improperly included in CalPERS' *Post-Hearing Brief* and its *RJN* simply to prejudice Guido.

The ALJ should strike them from the pleadings and disregard them in reaching his decision on the matter. Respondent respectfully requests that he do so.

Dated: March 29, 2013

By: _____
John Michael Jensen,
Attorney for Respondent
Fred Guido

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PROOF OF SERVICE BY MAIL

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 11500 West Olympic Blvd., Ste. 550, Los Angeles, CA 90064.

On March 29, 2013, I served the following document by the method indicated below:

FRED GUIDO'S NOTICE OF MOTION AND MOTION TO STRIKE PORTIONS OF CALPERS' *POST-HEARING BRIEF* AND ALL OF CALPERS' *REQUEST FOR OFFICIAL NOTICE*; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Said document was served by placing the document listed above in a sealed envelope and consigning it to a mail service for delivery to the address set forth below.

Harvey L. Leiderman
Jeffrey R. Rieger
Reed Smith LLP
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Christine Hsu
OLIVAREZ MADRUGA
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Los Angeles, CA 90015

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 29, 2013, at Los Angeles, California.

Griselda Montes de Oca

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Attorneys for Petitioner, California Public Employees' Retirement System

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BEFORE THE BOARD OF ADMINISTRATION

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of Applicability of Government Code Section 20638 to Member Fred Guido: FRED GUIDO, Respondent, CITY OF CUDAHY, Respondent.	Case No. 9711 OAH No. 2012030387 **CALPERS' OPPOSITION TO FRED GUIDO'S MOTION TO STRIKE** Hearing Date: November 13, 2012 through November 16, 2012 at 9:00 a.m. Place: Office of Administrative Hearings 320 West Fourth St., 6th Floor, Suite 630 Los Angeles, CA

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OPPOSITION

Fred Guido asserts a claim of equitable estoppel against CalPERS and he has the burden of proof on that claim. *See Coffin v. Alcoholic Beverage Control Appeals Bd.* (2006) 139 Cal.App.4th 471, 476 (holding that the person against whom the statement of issues is filed "bear[s] the burden of proof at the hearing regarding the issues raised").

Here, CalPERS contends that the Court will not even need to get to any balancing of the equities, because Guido has not met his burden of proof on two of the four essential elements of his equitable estoppel claim. Further, CalPERS contends that, even if Guido had met his burden on all four essential elements, equitable estoppel would not be available to alter the unambiguous terms of PERL section 20638. *See Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 870; *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 543.

If, however, the Court were to disagree with CalPERS on these first two arguments, then all parties agree that, for Guido to prevail on his equitable estoppel claim, this Court would have to balance the equities and find that this is one of those "exceptional" cases in which estoppel may be applied against a public entity. *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 501.

As one court explained: "[I]t is axiomatic that one who seeks equity must be willing to do equity. This maxim has been interpreted to mean that a court will not grant equitable relief to one party unless that party acknowledges the equitable claims or defenses of the adverse party that grow out of the same controversy. This maxim stems from the paramount principle that equity is, peculiarly, a forum of conscience." *In re Marriage of Plescia* (1997) 59 Cal.App.4th 252, 257-258 (internal citations and marks omitted). Thus, the Court's balancing of the equities should broadly consider the nature of the relief Guido seeks with a focus on principles of fairness and justice.

To fund Guido's anticipated retirement benefits from CalPERS that he earned while he was a member of the Cudahy City Council, the City of Cudahy made contributions to CalPERS based on Guido's $150 monthly pay. RT1 at 190:4-15. Guido himself contributed

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a total of $821.41 in member contributions towards his future CalPERS benefits. RT1 at 186:14-21. Guido now seeks a pension of about $40,000 per year for the rest of his life (plus cost of living increases) based on his $150/month service on the Cudahy City Council.

In its Post-Hearing Brief, CalPERS cited the Legislative History of Senate Bill 53 to demonstrate that CalPERS' characterization of the benefits Guido seeks as a "windfall" is based on more than just common sense. Rather, it is based on express findings of the California Legislature. The materials CalPERS cites are recognized as citable Legislative History and Guido does not contend otherwise. Rather, Guido merely contends that the materials are "prejudicial" to him. If these materials are harmful to Guido's case, it is only because they fairly present the full context of the equitable relief he seeks from this Court.

Guido filed a Post-Hearing Brief and he also has the opportunity to file a Reply Brief, in which he is free to respond to all of the arguments appearing in CalPERS' Post-Hearing Brief. There is no good reason for the Court to strike CalPERS' arguments regarding the "windfall" Guido seeks, which are supported by the Legislative History of Senate Bill 53. Those arguments should be given their appropriate weight, just like Guido's arguments will be given appropriate weight, if and when the Court gets to a balancing of the equities in a "forum of conscience." *In re Marriage of Plescia*, *supra*, 59 Cal.App.4th at 258.

DATED: April 9, 2013.

REED SMITH LLP

By_____
Jeffrey R. Rieger
Attorneys for Petitioner California Public Employees Retirement System

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, California 94105-3659. On April 9, 2013, I served the following document(s) by the method indicated below:

CALPERS' OPPOSITION TO FRED GUIDO'S MOTION TO STRIKE

☑ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 9, 2013, at San Francisco, California.

Julie Little

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