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7 BEFORE THE BOARD OF ADMINISTRATION
8 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

9
10 In the Matter of Applicability of Government
11 Code Section 20638 to Member Fred Guido

) CALPERS CASE NO. 9711
) OAH CASE NO. 2012030387

12 FRED GUIDO,

) 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

13 Respondent,

14 and

15 CITY OF CUDAHY,

16 Respondent.

) OAH Hearing: November 13-15, 2012
) Hearing Location: Los Angeles OAH
) Presiding ALJ: Eric Sawyer

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20 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

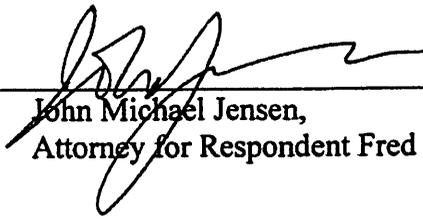
21 PLEASE TAKE NOTICE that Respondent Fred Guido hereby moves the Office of
22 Administrative Hearings, pursuant to *Code of Civil Procedure* sections 435 through 437, for an
23 Order striking (1) portions of *CalPERS' Post-Hearing Brief* and (2) *CalPERS'* entire *Request for*
24 *Official Notice*,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

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

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

2 Respectfully submitted,

3
4 Dated: March 29, 2013

By: 
John Michael Jensen,
Attorney for Respondent Fred Guido

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1 **MEMORANDUM IN SUPPORT OF MOTION TO STRIKE**

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3 **INTRODUCTION**

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

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

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

15 **A. CalPERS' Post-Hearing Brief**

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

20 **B. CalPERS' Request for Official Notice**

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

23
24 **LAW AND ARGUMENT**

25 **I. Highly Prejudicial Political Statements**

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

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

4 **II. Not Properly in Dispute, Not Noticed, Irrelevant**

5 CalPERS' *RJN* seeks official notice of the legislative history of Senate Bill 53 (1993-
6 1994) which eventually became *Government Code* section 20039 (though never identified as
7 such by CalPERS). CalPERS' *Post-Hearing Brief* contains repeated irrelevant references to that
8 history and to the effects of Section 20039.

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

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

14 **ISSUE FOR DETERMINATION**

15 This Appeal is limited to the issue of whether Guido is entitled to have his
16 "compensation earnable" based on his "average monthly salary during any period
17 of service" as a member of LACERA, for the purposes of calculating the "final
18 compensation" used to determine his retirement allowance from CalPERS,
pursuant to *Government Code* section 20638.

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

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

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

5 **III. CalPERS Includes the Improper Material To Prejudice Guido**

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

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

12 **IV. Legal Issues in This Case, Existing Law**

13 The PERL explicitly permits Guido (who served on the Cudahy City Council from 1970
14 to 1982) to have his pension allowance calculated as a product of his highest qualifying
15 CalPERS compensation multiplied by his total service credit, including his elective service. This
16 is true for *all* elected city council members or county supervisors who began their elective
17 service prior to July 1, 1994.

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

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

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

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

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

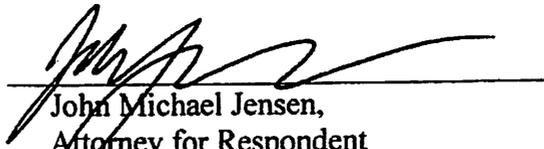
11 *Code of Civil Procedure* section 436(a) permits the Court to strike "improper" matters
12 from any pleading. The material described above meets that description and should be stricken
13 and not considered in the determination of the matters in this proceeding.

14
15 **CONCLUSION**

16 The material referenced by CalPERS concerning the legislative history of Senate Bill 53
17 (1993-1994) and its repeated references to alleged "windfalls", "pension spiking" and
18 "loopholes" are irrelevant to the subject matter before the OAH, contribute nothing to the
19 resolution of the issues that are at issue, are highly prejudicial, and are improperly included in
20 CalPERS' *Post-Hearing Brief* and its *RJN* simply to prejudice Guido.

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

23
24
25 Dated: March 29, 2013

26 By: 
27 John Michael Jensen,
28 Attorney for Respondent
Fred Guido

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