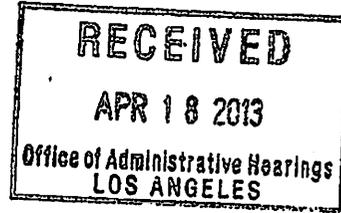


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9 BEFORE THE BOARD OF ADMINISTRATION
10 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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

Case No. 9711
OAH No. 2012030387

12 FRED GUIDO,

**CALPERS' OPPOSITION TO FRED
GUIDO'S MOTION TO STRIKE**

13 Respondent,

Hearing Date: November 13, 2012 through
November 16, 2012 at 9:00 a.m.

14 CITY OF CUDAHY,

15 Respondent.
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Place: Office of Administrative Hearings
320 West Fourth St.,
6th Floor, Suite 630
Los Angeles, CA

REED SMITH LLP
A limited liability partnership formed in the State of Delaware

OPPOSITION

1
2 Fred Guido asserts a claim of equitable estoppel against CalPERS and he has the
3 burden of proof on that claim. *See Coffin v. Alcoholic Beverage Control Appeals Bd.* (2006)
4 139 Cal.App.4th 471, 476 (holding that the person against whom the statement of issues is
5 filed “bear[s] the burden of proof at the hearing regarding the issues raised”).

6 Here, CalPERS contends that the Court will not even need to get to any balancing of
7 the equities, because Guido has not met his burden of proof on two of the four essential
8 elements of his equitable estoppel claim. Further, CalPERS contends that, even if Guido had
9 met his burden on all four essential elements, equitable estoppel would not be available to
10 alter the unambiguous terms of PERL section 20638. *See Medina v. Board of Retirement*
11 (2003) 112 Cal.App.4th 864, 870; *City of Pleasanton v. Board of Administration* (2012) 211
12 Cal.App.4th 522, 543.

13 If, however, the Court were to disagree with CalPERS on these first two arguments,
14 then all parties agree that, for Guido to prevail on his equitable estoppel claim, this Court
15 would have to balance the equities and find that this is one of those “exceptional” cases in
16 which estoppel may be applied against a public entity. *City of Long Beach v. Mansell* (1970)
17 3 Cal.3d 462, 501.

18 As one court explained: “[I]t is axiomatic that one who seeks equity must be willing
19 to do equity. This maxim has been interpreted to mean that a court will not grant equitable
20 relief to one party unless that party acknowledges the equitable claims or defenses of the
21 adverse party that grow out of the same controversy. This maxim stems from the paramount
22 principle that equity is, peculiarly, a forum of conscience.” *In re Marriage of Plescia* (1997)
23 59 Cal.App.4th 252, 257-258 (internal citations and marks omitted). Thus, the Court’s
24 balancing of the equities should broadly consider the nature of the relief Guido seeks with a
25 focus on principles of fairness and justice.

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

1 a total of \$821.41 in member contributions towards his future CalPERS benefits. RT1 at
2 186:14-21. Guido now seeks a pension of about \$40,000 per year for the rest of his life (plus
3 cost of living increases) based on his \$150/month service on the Cudahy City Council.

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

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

18
19 DATED: April 9, 2013.

20 REED SMITH-LLP

21 By _____

22 Jeffrey R. Ralger
23 Attorneys for Petitioner California Public
24 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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