

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Statement of Issues Against:

GEORGE G. MIRABAL and
CITY OF BELL,

Respondents.

Case No. 2011-1097

OAH No. 2014030479

PROPOSED DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, on January 8, 2015, in Glendale.

Wesley E. Kennedy, Senior Staff Attorney, represented Karen DeFrank (Complainant).

Leo J. Moriarty, Esq., represented George G. Mirabal (Respondent).

Stephen R. Onstot, Esq., represented the City of Bell (the City).

The record was held open after the hearing for the parties to submit closing briefs. The briefs received were identified in an order the ALJ issued describing the events that transpired while the record was held open. The record was closed and the matter deemed submitted for decision on March 19, 2015.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Statement of Issues was filed by Complainant in her official capacity as the Chief of the Customer Account Services Division for the California Public Employees' Retirement System (PERS).

2. A. On a date not established, Respondent first became employed by the City as a City Council Member. Effective April 15, 1986, he elected optional membership in PERS for that position. Effective April 17, 1990, Respondent withdrew his contributions from PERS and terminated his membership.

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B. Effective April 21, 1992, Respondent was appointed to the position of City Clerk of the City and he elected to again become a member of PERS. Respondent separated from service with the City, effective November 2, 1998.

C. Effective April 1, 2003, Respondent was elected to City Council and again elected membership in PERS. He remained in that capacity until he retired as described below.

3. PERS is a defined benefit plan. Benefits for its members are funded by employee and employer contributions, as well as by interest and other earnings on those contributions. The amount of an employee's contributions is determined by applying a fixed percentage to the member's compensation. A public agency's contribution is determined by applying a rate to the payroll of the agency. Using certain actuarial assumptions specified by law, PERS' Board of Administration (Board) sets employer contribution rates annually.

4. The City is a contracting agency with PERS for retirement benefits for its eligible employees. The provisions of the City's contract with PERS are governed by the California Public Employees' Retirement Law (the PERL). (Gov. Code, § 20000 et seq.)

5. On January 27, 2011, Respondent signed an application for service retirement. Respondent retired for service effective March 5, 2011, with 19.950 years of service credit. Of that service credit, 14.950 years was for "normal service," which was the amount of time Respondent served the City as a City Clerk and City Council Member, and 5.000 years was time purchased for him through the Additional Retirement Service Credit (ARSC) program.

6. By letter dated May 31, 2011, PERS notified Respondent and the City that it had determined: (a) Respondent's salary as a City Council Member could have been no higher than \$673 per month and that no higher amount would be used in calculating his retirement benefit because said higher amounts were not included in a "publicly available pay schedule;" and (b) reported compensation from his service on City-related boards, commissions and authorities would not be used in calculating his retirement benefit because such compensation was for work performed outside his position as a City Council Member. For those reasons, PERS stated it would use the amount of \$673 per month as his final compensation amount for purposes of calculating his monthly retirement benefit.

7. By letter dated June 3, 2011, and attached documents, PERS advised Respondent that he was being released on to the retirement roll with a monthly retirement benefit of \$262.08, based on a final compensation amount of \$673.00 per month.

8. By letter dated June 30, 2011, Respondent timely appealed PERS' decision described in its letter dated May 31, 2011, and requested an administrative hearing.

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9. By letter dated June 29, 2012, PERS supplemented its aforementioned determination letter, by advising Respondent that it was rescinding his five years of ARSC because PERS had determined that said purchase was financed by the City, as opposed to Respondent, and was therefore invalid. Respondent and the City were advised that Respondent's total service credit would be reduced to 14.950 years and that his monthly retirement benefit would be reduced to \$203.51. Respondent and the City were advised of their appeal rights.

10. PERS sent Respondent a letter dated January 25, 2013, in which it advised him and the City that PERS' proposal to rescind the five years of ARSC had been finalized because Respondent did not appeal from the prior notification. The parties were also notified that Respondent's monthly retirement benefit would be \$203.51. However, Respondent and the City were again advised of rights to appeal that decision. No evidence was presented indicating whether Respondent or the City submitted an appeal in response.

11. According to the Statement of Issues, PERS deems this matter to be limited to "whether PERS has correctly determined Respondent's retirement benefits pursuant to the PERL." However, at the outset of the hearing, the parties stipulated that the sole issue to be decided in this case is the amount of Respondent's final compensation earnable, and that this case would not involve the rescission of Respondent's ARSC or the forfeiture of any pension benefits as a result of Respondent's recent felony conviction.¹

Respondent's Base Salary as a City Council Member

12. Section 502 of the Charter of the City of Bell (City Charter) provides:

The members of the City Council shall receive compensation for their service as may be prescribed by ordinance or resolution, but with respect to service as a Council Member not to exceed the amount which Council Members of general law cities of similar population would receive under State law. In addition, members shall receive such reasonable and adequate amounts as may be prescribed by ordinance, which amount shall be deemed to be reimbursement to them of other out-of-pocket expenditures and costs imposed upon them by virtue of their service on the City Council.

¹ Complainant unexpectedly presented arguments in her post-hearing filings concerning Respondent's ARSC and forfeiture of pension benefits due to his conviction. As a result of the aforementioned stipulation, as well as the fact that exhibits concerning Respondent's recent felony conviction had been withdrawn at hearing by Complainant's counsel, those issues shall not be decided herein.

13. Government Code section 36516 provides, in relevant part:
(a)(1) A city council may enact an ordinance providing that each member of the city council shall receive a salary based on the population of the city as set forth in paragraph (2).

(2) The salaries approved by ordinance under paragraph (1) shall be as follows:

(A) In cities up to and including 35,000 in population, up to and including three hundred dollars (\$300) per month.

[¶] . . . [¶]

(4) The salary of council members may be increased beyond the amount provided in this subdivision by an ordinance or by an amendment to an ordinance, but the amount of the increase shall not exceed an amount equal to 5 percent for each calendar year from the operative date of the last adjustment of the salary in effect when the ordinance or amendment is enacted. No ordinance shall be enacted or amended to provide automatic future increases in salary.

(b) Notwithstanding subdivision (a), at any municipal election, the question of whether city council members shall receive a salary for services, and the amount of that salary, may be submitted to the electors. If a majority of the electors voting at the election favor it, all of the council members shall receive the salary specified in the election call. The salary of council members may be increased beyond the amount provided in this section or decreased below the amount in the same manner.

(c) Unless specifically authorized by another statute, a city council may not enact an ordinance providing for compensation to city council members in excess of that authorized by the procedures described in subdivisions (a) and (b). For the purposes of this section, compensation includes payment for service by a city council member on a commission, committee, board, authority, or similar body on which the city council member serves. If the other statute that authorizes the compensation does not specify the amount of compensation, the maximum amount shall be one hundred fifty dollars (\$150) per month for each commission, committee, board, authority, or similar body.

14. The City is a general law city subject to Government Code section 36516. The parties stipulated that at all relevant times the City's population did not exceed 35,000 people, which would have entitled Respondent to a salary not to exceed \$300.00 per month, unless other increases were approved consistent with Government Code section 36516.

15. Notwithstanding Government Code section 36516 and City Charter section 502, Respondent received during his tenure as City Council Member the following base salary and increases or decreases: a) effective March 2003, \$673.01 per month; b) effective April 2005, \$1,332.00 per month; c) effective July 2005, \$150.00 per month; d) effective July 2010, \$150.00 per month; and e) effective November 2010, \$673.00 per month.

16. No evidence was presented indicating that at any time relevant a municipal election was held within the City in which an increase in salary for City Council members was approved.

17. The highest amount of base salary Respondent received from the City was \$1,332.00 per month, which was effective from April through July 2005. The next highest base salary Respondent received was \$673.00 per month, which was effective over various periods. PERS and the City concede that the base salary of \$673.00 per month was consistent with the aforementioned provisions of the Government Code and City Charter.

18. As for the base salary amount of \$1,332.00 per month, it was established by a preponderance of the evidence, including the persuasive testimony of PERS employee Lolita Lueras, that City Ordinance No. 1158, dated March 5, 2005, which increased City Council Member salaries to \$1,332.00 per month, was inconsistent with the aforementioned provisions of the City Charter and Government Code and therefore not valid.

19. In addition, City Ordinance No. 1158 was facially flawed and recited facts that were patently false. Specifically, City Ordinance No. 1158, enacted in 2005, stated the reason for the salary increase to \$1,332.00 per month was because City Council Member salary had not been increased since 1991, when City Council Member salary was purportedly \$673.00 per month. However, City Ordinance No. 1139, which was enacted in March 2001, established that City Council Member salary had actually been adjusted to \$434.00 per month in April 1992; and that the salary was again increased to \$673.00 per month, effective July 2, 2001. Therefore, City Ordinance No. 1158 stated a date when salary was purportedly \$673.00 per month that was 10 years earlier than it had been and falsely stated the last year in which the salary had been increased, which essentially facilitated a double salary increase for the same time period.

Compensation for Service on Boards, Commissions and Authorities

20. In addition to his aforementioned base salary, Respondent received other compensation while serving as a City Council Member.

21. Health and Safety Code section 34274, concerning compensation of commissioners of a municipal housing authority, provides in relevant part:

A commissioner shall not be regularly employed by the authority to which he is appointed during his tenure of office, but may receive per diem payment for attendance at not more than four meetings per month of the authority, which shall not exceed fifty dollars (\$50) per day, and shall receive necessary traveling and subsistence expenses incurred in the discharge of his duties.

22. Notwithstanding Health and Safety Code section 34274, and in addition to his base salary as a City Council Member, Respondent received the following monthly compensation and increases in his ex officio position on the Bell Housing Authority:

A.	2003-2004	\$650.09
B.	2004-2005	\$754.26
C.	2005-2006	\$991.34
D.	2006-2007	\$1,158.02
E.	2007-2008	\$1,324.68
F.	2008-2009	\$1,491.32
G.	2009-2010	\$1,574.65

23. It was not established how many meetings Respondent attended, if any, in his ex officio position on the Bell Housing Authority, or that any of his compensation was for expenses incurred in discharging his duties.

24. Government Code section 40539, concerning the compensation of a commissioner on a surplus property commission provides, "If allowed by the commission a commissioner shall receive traveling and other expenses incurred by him in his employment."

25. Notwithstanding Government Code section 40539, and in addition to his base salary as a City Council Member, Respondent received the following monthly compensation and increases for his position on the Bell Surplus Property Authority:

A.	2003-2004	\$650.08
B.	2004-2005	\$754.26
C.	2005-2006	\$991.34
D.	2006-2007	\$1,158.02
E.	2007-2008	\$1,324.68
F.	2008-2009	\$1,491.32
G.	2009-2010	\$1,574.65

26. It was not established that any of Respondent's payments for serving on the Bell Surplus Property Authority were for travel or other expenses as contemplated by Government Code section 40539.

27. Pursuant to City Ordinance No. 1160, effective August 15, 2005, the City intended to create a Solid Waste and Recycling Authority as a Joint Powers Authority, pursuant to Government Code section 6500 et seq. PERS has questioned whether such an authority was actually created, and Respondent failed to establish that it was. In any event, in addition to his salary as a City Council Member, Respondent received the following monthly compensation and increases for participation on that authority:

A.	2005-2006	\$991.34
B.	2006-2007	\$1,158.02
C.	2007-2008	\$1,324.68
D.	2008-2009	\$1,491.32
E.	2009-2010	\$1,574.65

28. The Bell Financing Authority was established in 1991 as a Joint Powers Agency between the City and the City's Community Housing Authority, and therefore was a separate public agency from the City. Notwithstanding the above, and in addition to his base salary as a City Council Member, Respondent received the following monthly compensation and increases for his position on this authority:

A.	2003-2004	\$650.09
B.	2004-2005	\$754.26
C.	2005-2006	\$991.34
D.	2006-2007	\$1,158.02
E.	2007-2008	\$1,324.68

29. Respondent held a position on the City's Planning Commission. In addition to his base salary as a City Council Member, Respondent received the following monthly compensation and increases for his position on this commission:

A.	2003-2004	\$650.09
B.	2004-2005	\$754.26
C.	2005-2006	\$991.34
D.	2006-2007	\$1,158.02
E.	2007-2008	\$1,324.68
F.	2008-2009	\$1,491.32
G.	2009-2010	\$1,574.65

30. Respondent held a position on the City's Community Redevelopment Authority. In addition to his base salary as a City Council Member, Respondent was paid the following monthly compensation for his position on this authority: 2003-2010, \$60.00.

31. It was established by the persuasive testimony of PERS employee Lolita Lueras and the City's current City Clerk, Rebecca Valdez, that none of the aforementioned boards, commissions or authorities were members of PERS or otherwise participated in or made contributions to PERS for Respondent.

32. It was established by a preponderance of the evidence, including the persuasive testimony of Ms. Lueras and Ms. Valdez, that Respondent's base salary as a City Council Member and his compensation for serving on the other boards, commissions and authorities, were not made publically available, including that such information would have not been disclosed pursuant to a California Public Records Act request made under Government Code section 6250 et seq.

33. Based on the above, Respondent received compensation in the following total amounts for serving on the various other commissions, boards and authorities (other City-related services), which, when combined with his base salary, brought his total compensation to the following amounts:

A. Effective March 2003, \$1,827.03 per month in bilingual, education, an unspecified differential and an auto allowance, for a total monthly compensation of \$2,500.04.

B. Effective April 2005, \$3,077.04 per month for other City-related services, for a total monthly compensation of \$4,409.04.

C. Effective July 2005, \$5,016.70 per month for other City-related services, for a total monthly compensation of \$5,166.70.

D. Effective July 2007, \$6,683.38 per month for other City-related services, for a total monthly compensation of \$6,833.38.

E. Effective July 2008, \$7,516.61 per month for other City-related services, for a total monthly compensation of \$7,666.61.

F. Effective July 2009, \$7,933.25 per month for other City-related services, for a total monthly compensation of \$8,083.25. This was the highest amount of total compensation Respondent received while employed by the City.

G. Effective July 2010, \$523.00 per month for other City-related services, for a total monthly compensation of \$673.00.

H. Effective November 2010, Respondent no longer received any compensation other than his base salary, which was \$673.00 per month at the time and thereafter.

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PERS' Determination

34. Based on the above, the City reported to PERS that Respondent's average earnings during his final compensation period was \$8,083.25 per month. Said amount covered the time period of July 1, 2008, through July 1, 2009. This was the highest reported amount of compensation during a consecutive 12-month period. The amount was based on Respondent's base salary of \$150.00 per month, as well as the additional \$7,933.25 per month of compensation attributed to Respondent's service on the aforementioned boards, commissions and authorities.

35. PERS reviewed the above referenced Government Code sections, City Charter and Ordinances, PERS' Office of Audit Services Report completed on November 12, 2010, and information provided by the City.

36. After evaluating the aforementioned data, PERS concluded that Respondent's full-time position was that of City Council Member and that the normal rate of pay or base pay for that position was \$673.00 per month.

37. PERS also determined that \$673.00 per month was Respondent's allowable compensation earnable for purposes of his retirement benefit, because: a) his position as City Council Member alone was deemed a full-time position pursuant to Government Code sections 20899 and 20635; b) that was the compensation amount dictated by operation of Section 502 of the City Charter and Government Code section 36516; and c) City Ordinance No. 1158, which purported to raise City Council Member salary to \$1,332.00 per month, was inconsistent with the City Charter and Government Code and therefore invalid.

38. In addition, PERS concluded that it could not include the compensation associated with Respondent's services performed for the Community Housing Authority, the Surplus Property Authority, the Solid Waste and Recycling Authority, the Public Finance Authority, the Planning Commission or the Community Redevelopment Authority, because: a) it failed to meet the definition of special compensation or payrate; b) it was in excess of the above-described payrate for the position of City Council Member; and c) it was in excess of the payrate or base pay of similarly situated member of the same group or class of employment.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The person against whom a statement of issues is filed generally bears the burden of proof at the hearing regarding the issues raised. (*Coffin v. Department of Alcoholic Beverage Control* (2006) 139 Cal.App.4th 471, 476.)

2. In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 and footnote 5, the court generally considered the issue of burden of proof in an administrative hearing concerning retirement benefits and found “the party asserting the affirmative at an administrative hearing has the burden of proof, including . . . the burden of persuasion by a preponderance of the evidence.”

3. In the absence of a contrary statutory provision, an applicant for a benefit has the burden of proof as the moving party to establish a right to the claimed entitlement or benefit, and that burden is unaffected by the general rule that pension statutes are to be liberally construed. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

4. In addition, PERS’ interpretation of the PERL and its accompanying regulations is generally entitled to deference, since PERS is the agency charged with enforcing the law. (*City of Pleasanton v. Board of Administration of the California Public Employees’ Retirement System* (2012) 211 Cal.App.4th 522, 539.)

5. The ALJ is aware of no case precisely covering the issue at bar, i.e., which party has the burden of proof in a dispute over a retired employee’s final compensation amount. In this vacuum, the general principles of administrative law articulated in the aforementioned cases seem an appropriate fit. In a sense, that case law creates a rebuttable presumption that PERS’ determination is correct. This is especially so here where PERS made its determination before placing Respondent on the retirement roll and making payments to him based on that determination. An opposite situation would pose the more challenging question whether PERS would assume the burden of proof by proposing a change to the status quo benefit already being paid to its retiree. Regardless, there is no dispute that the preponderance of the evidence standard is proper in this case.

6. Based on the above, Respondent has the burden of establishing by a preponderance of the evidence that he is entitled to an amount of final compensation higher than \$673.00 per month.

Final Compensation Generally

7. The formula for determining a member’s retirement benefit takes into account: (1) years of service; (2) a percentage figure based on age on the date of retirement; and (3) “final compensation.” (Gov. Code, §§ 20037, 21350, 21352, 21354.5; *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1479.) The issue presented in this case relates to the computation of Respondent’s final compensation.

8. Final compensation is determined, in part, by determining a member’s compensation earnable. Government Code section 20630 generally defines compensation as “the remuneration paid out of funds controlled by the employer in payment for the member’s services performed during normal working hours or for time during which the member is excused from work because of holidays, sick leave, industrial disability leave, vacation, compensatory time off, and leave of absence.”

9. “Compensation earnable” is composed of (1) payrate, plus (2) special compensation. (Gov. Code, § 20636.)

10. Payrate “means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, pursuant to publicly available pay schedules.” (Gov. Code, § 20636, subd. (b)(1).)

11. Special compensation includes a payment received for special skills, knowledge, abilities, work assignment, workdays or hours, or other work conditions. (Gov. Code, § 20636, subd. (c)(1).) Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, to similarly situated members of a group or class of employment that is in addition to payrate. (Gov. Code, § 20636, subd. (c)(2).) Special compensation shall be for services rendered during normal working hours and the employer shall identify and report the pay period in which the special compensation was earned. (Gov. Code, § 20636, subd. (c)(3).) Similarly, special compensation does not include “(B) [p]ayments made for additional services rendered outside of normal working hours, . . . or (C) [o]ther payments the board has not affirmatively determined to be special compensation.” (Gov. Code, § 20636, subd. (c)(7).)

12. The reference to “publicly available pay schedules” set forth in Government Code section 20636, subdivision (b)(1), was added by the Legislature in 2006. Legislative history confirms that “the change was a matter of clarification.” (*Prentice v. Board of Admin., California Public Employees’ Retirement System* (2007) 157 Cal.App.4th 983, 990, fn. 4.) For example, the term “publicly available” has been determined to be consistent with “a published monthly payrate,” such that a settlement payment that was not paid in accordance with a “publicly available pay schedule for services rendered on a full time basis during normal working hours” cannot be used to calculate the amount of a PERS retirement allowance. (*Molina v. Board of Admin., California Public Employees’ Retirement System* (2001) 200 Cal.App.4th 53, 66-67.)

13. Official notice was taken of Senate Bill 53, which was introduced in 1992 and enacted in 1993. SB 53 defined “compensation earnable” in terms of normal payrate, rate of pay, or base pay so payrates would be “stable and predictable among all members of a group or class” and “publically noticed by the governing body.” The legislation was intended to restrict an employer’s ability to spike pension benefits for preferred employees and to result in equal treatment of public employees. (Ex. 20.)

14. The PERS system, via its definitions of “compensation earnable” and “final compensation,” contemplates equality in benefits between members of the “same group or class of employment and at the same rate of pay.” There is clearly an intent not to treat members within the same class and at the same pay dissimilarly, although there is no intent to grant parity between employees of different classes and rates of pay. (*City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1492.)

Respondent's Final Compensation

15. There are a variety of reasons supporting PERS' decision to not allow any amount greater than \$673 per month to serve as Respondent's final compensation. For example, Respondent failed to establish how his base salary as a City Council Member could have been greater than \$673 per month, as dictated by operation of Government Code section 36516 as it interacted with section 502 of the City Charter. It was not established that a salary increase greater than that amount was approved by municipal election in the City. The only ordinance in which a base salary of greater than \$673 per month was approved, Ordinance No. 1158, was proven to be inconsistent with the City Charter and Government Code section 36516, as well as false on its face, and therefor invalid.

16. Respondent similarly failed to establish that the additional compensation he received for serving on the other boards, commissions and authorities could also be considered as final compensation. To the contrary, all of that compensation appears to have violated Government Code section 36516 as it interacted with section 502 of the City Charter. It is hard to conclude that compensation received in violation of the law should still be considered to be part of final compensation. Specifically:

A. The Health and Safety Code provides only for compensation of \$50 per meeting attended per month for serving on a municipal housing authority. It was not established how many meetings, if any, that Respondent attended for the Bell Housing Authority. It strains credulity to believe Respondent attended as many meetings per month for that authority as would be required to justify the amount he was paid.

B. The Government Code only provides for reimbursement of traveling and other expenses incurred for serving on a municipal surplus property commission. Respondent presented no evidence indicating that any of the compensation he received for serving on the Bell Surplus Property Authority was for traveling or other expenses incurred. As he received the same amount each month, this compensation appears not to be for actual expenses.

C. It was not established whether the City ever created a valid solid waste and recycling authority, thus the compensation Respondent received for serving on the City's Solid Waste and Recycling Authority is subject to question.

D. Government Code section 36516, subdivision (c), apparently closes any loophole for giving general law city council members compensation in excess of what is allowed in subdivision (a), by stating that compensation for service on other boards, commissions, authorities or committees cannot exceed \$150 per month, unless another statute specifically authorizes the higher amount and the city in question passes a valid ordinance approving the same. In this case, the few statutes specifically listing compensation amounts referenced above actually provided much less compensation than \$150 per month. No party cited any other statute specifying any amount of compensation for service on the other boards, commissions and authorities on which Respondent served, meaning he could not be paid more than \$150 per month for such service. Yet, Respondent was paid multiples

more than \$150 per month for each board, commission and authority on which he served, with the lone exception of the Community Redevelopment Authority. That fact indicates the compensation he received was in violation of the applicable laws.

E. Pursuant to Government Code section 20899, Respondent's position as City Council Member was deemed to be a full-time position. Pursuant to section 20635, if a member concurrently renders service in two or more positions, one of which is full-time, the service in the other part-time positions shall be considered overtime. According to section 20636, both payrate and special compensation must be for services rendered during normal working hours. In this case, it is presumed Respondent's service on the City Council, for which he was compensated by his base salary, was his service during his normal working hours. Respondent presented no evidence indicating otherwise. Pursuant to section 20635, overtime is excluded from final compensation. In this case, Respondent's full-time position was as a City Council Member. His service on the other boards, commissions and authorities should be seen as additional part-time service. If his service on the other City-related entities was part of his position as a City Council Member, such begs the question why he would be entitled to additional compensation.

17. It was not established that Respondent's additional compensation for serving on the other boards, commissions and authorities was based on publicly available pay schedules. In fact, the evidence indicated the opposite. Though the part of the PERL specifically referencing publicly available pay schedules was added to the law in 2006, in the midst of Respondent's career with the City, that amendment was clearly intended as a clarification and not a wholesale change in the law. Pursuant to Government Code section 20636, compensation cannot be considered to be part of an employee's "payrate" if it is not based on a publicly available pay schedule. Since neither Respondent's higher base salary or his compensation for serving on the other boards, commissions and authorities were proven to be part of publicly available pay schedules, that compensation cannot be considered part of his payrate. Nor was it established that the additional compensation was special compensation. Government Code section 20636, subdivision (c), requires that special compensation be made pursuant to a labor policy or agreement, or otherwise required by state or federal law. In this case, no labor policy or agreement was presented. As discussed above, not only was the additional compensation not required by state or federal law, it violated state and municipal law.

18. Finally, it was not established that all City Council Members were subject to the same amounts of compensation for serving on the same boards, commissions or authorities, or that all of the other City Council Members were treated as though the additional compensation they received for such service was part of their salary as a City Council Member. Since the City's Council Member compensation situation was unorthodox, to say the least, this is a fact that cannot be easily assumed. Put simply, there is nothing in the record establishing that a City Council Member received the same amount of compensation as Respondent simply by dint of serving as a City Council Member. Compensation not available at the same rate to all similarly situated members of a class of employees cannot be considered for purposes of final compensation, either as payrate or special compensation.

19. Under these circumstances, it was not established that Respondent's final compensation could be greater than \$673 per month. The evidence presented by PERS and the City supported PERS' determination of what to include in Respondent's final compensation. Based on the aforementioned case law, a rebuttable presumption was created supporting PERS' determination. Respondent failed to rebut that presumption by failing to establish by a preponderance of the evidence that his final compensation should be greater than \$670 per month. (Factual Findings 1-38; Legal Conclusions 1-18.)

Vested Pension Rights

20. Respondent cites to *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131, for the proposition that because pension rights vest during employment, the only modification that can be made before retirement are those that are reasonable and serve the purpose of pension system flexibility; and, if they result in a disadvantage to the employee, they should be accompanied by comparable new advantage. Respondent also cites to *City of Long Beach v. Allen* (1956) 143 Cal.App.2d 35, for the proposition that after retirement, pension benefits may not be changed to the detriment of the retiree. Respondent argues that in this case, PERS' decision regarding his final compensation amount is tantamount to changing Respondent's retirement benefits before and after his retirement became effective.

21. However, there is nothing in the record indicating that any portion of the PERL was changed to Respondent's detriment or that PERS' decision regarding his final compensation amount has caused such a result. As discussed above, the amendment to Government Code section 20636 regarding "publicly available pay schedules" was a matter of clarification of a concept that had been used in prior case law. In any event, it went into effect well before Respondent retired and before Respondent received most of the compensation at issue in this case. The situation in this case simply involves the way in which PERS has interpreted the compensation Respondent received by the City and how the PERL is applied to it. The aforementioned cases cited by Respondent do not apply.

Estoppel and Laches

22. Respondent argues that PERS should be equitably estopped from disallowing the higher amount of base salary or the additional compensation from serving on the other boards, commissions and authorities because the City made contributions to PERS for years based on the higher amounts of compensation and he relied to his detriment that he would receive higher pension benefits based on the higher amount of reported compensation.

23. 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 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. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

24. However, in this case, Respondent did not establish each of the required elements. Respondent did not testify in this matter; in fact, he was not present at the hearing. No evidence established that Respondent relied on any actions of the City or PERS for purposes of his pension benefits or retirement planning. For example, no evidence was presented indicating that Respondent requested or received an estimate of his benefits before or at the time he submitted his retirement papers. Based on the shaky legal underpinnings of the compensation at issue, it is not apparent that Respondent was ignorant of the possibility that PERS would not accept that compensation for purposes of his final compensation either. If he was so ignorant, the burden was on Respondent to establish the same, which he failed to do. (Factual Findings 1-38; Legal Conclusions 1-21.)

25. Respondent's estoppel argument also is problematic because appellate courts have held 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 v. Board of Retirement, Los Angeles County Employees Retirement Assn.* (2003) 112 Cal.App.4th 864, 870.) As discussed above, the PERL does not support Respondent's final compensation including the higher amount of base salary or the additional compensation he received serving on the other boards, commissions and authorities. Finally, for estoppel to apply against a government agency that had no legal authority to do what it is requested to do, it must be shown that "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." (*City of Long Beach v. Mansell, supra*, 3 Cal.3d 462, pp. 496-497.) In this case, Respondent failed to establish that an injustice would result if his final compensation is based on compensation that the City was either not legally permitted to pay him or would create a deleterious public policy by allowing municipal political figures to receive compensation inconsistent with the law or not made publicly known to their electorate.

26. Respondent argues there has been an unreasonable delay in initiating this proceeding, which has caused him prejudice, and that the doctrine of laches applies. (*Gates v. Dept. of Motor Vehicles* (1979) 94 Cal.App.2d 921, 925; *Brown v. California State Personnel Board* (1985) 166 Cal.App.3d 1151.) Laches is established by an unreasonable delay in bringing an action resulting in prejudice to the other party in presenting a defense. (*Id.*) The party asserting laches bears the burden of establishing prejudice; prejudice is never presumed. (*Conti v. Board of Civil Service Commissioners* (1969) 1 Cal.3d 351, 362.)

27. In this case, it was not established that any inordinate or unreasonable delay occurred that would trigger laches. Respondent retired in January 2011, but was involved in correspondence with PERS in 2011, 2012 and early 2013 concerning his final compensation and his ARSC. The Statement of Issues was filed in 2014. No evidence indicates that Respondent pushed for earlier responses or action by PERS. In any event, Respondent failed to present any evidence indicating that he was prejudiced in preparing a defense in this case based on this timing of events. Since prejudice is never presumed and Respondent presented no evidence in this regard, he failed to establish the required elements of laches. (Factual Findings 1-38; Legal Conclusions 1-21.)

ORDER

The appeal of Respondent George G. Mirabal is denied. Respondent's final compensation for purposes of determining his monthly retirement benefit is \$673.00.

DATED: April 10, 2015



ERIC SAWYER
Administrative Law Judge
Office of Administrative Hearings