

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Statement of Issues of:

TERESA JACOBO,

Respondent,

and

CITY OF BELL,

Respondent.

Case No. 2013-0733

OAH No. 2014030511

PROPOSED DECISION

This matter was heard before Erlinda G. Shrenger, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, on October 24, 2014, in Glendale.

Wesley E. Kennedy, Senior Staff Attorney, represented Karen DeFrank (Complainant), Chief of the Customer Account Services Division, California Public Employees' Retirement System.

Leo J. Moriarty, Attorney at Law, represented Teresa Jacobo (Respondent), who was not present because she is incarcerated.

Stephen R. Onstot, Esq., Aleshire & Wynder LLP, represented the City of Bell (City or City of Bell).

Oral and documentary evidence was received on October 24, 2014. The record was held open for the parties to simultaneously file written closing briefs by December 15, 2014, and simultaneously file reply briefs by January 16, 2015. Complainant and the City of Bell timely filed their closing briefs, which were marked as exhibits 35 and 36, respectively. Respondent did not file a closing brief.

On January 9, 2015, the ALJ received a letter from Complainant's counsel requesting confirmation that no reply brief would be accepted from Respondent due to her failure to file an initial closing brief. The January 9, 2015 letter is marked as exhibit

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37. On January 15, 2015, the ALJ issued a Post-Hearing Order Re: Briefing Schedule ordering that if Respondent filed a brief on January 16, 2015, such brief would only be accepted for filing if it complied with the ALJ's previous order regarding reply briefs (i.e., seven page limit, no attachments, and receipt by OAH and opposing parties by 4 p.m. on January 16). In addition, the ALJ ordered that Complainant and the City could file a response to Respondent's brief, if any, by February 9, 2015. The ALJ's Post-Hearing Order is marked as exhibit 38.

On January 16, 2015, Respondent timely filed her Closing/Response Brief, which was marked as exhibit B. On January 21, 2015, the City of Bell filed a Motion to Strike Arguments Presented for the First Time in Jacobo's Reply Brief, which was marked as exhibit 39. The Motion to Strike is hereby denied. On January 30, 2015, Complainant filed a Post-Hearing Reply Brief, which was marked as exhibit 40. The record was closed and the matter was submitted for decision on February 9, 2015.

FACTUAL FINDINGS

Parties and Jurisdiction

1. The Statement of Issues was made and filed by Complainant in her official capacity.
2. The California Public Employees' Retirement System (PERS) is governed by the Public Employees' Retirement Law (PERL). (Gov. Code, § 20000 et seq.) The Board of Administration of PERS is the state agency vested with authority to manage and control PERS, to make rules and regulations as it deems proper, and to implement and enforce the PERL and its accompanying regulations. (See, Gov. Code, § 20120, et seq.) The Board is "the sole judge of the conditions under which persons may be admitted to or continue to receive benefits under this system." (Gov. Code, § 20125.)
3. PERS is a defined benefit plan. Benefits for PERS members are funded by member and employer contributions and by interest and other earnings on those contributions. A public agency may participate in PERS only if it has entered into a contract with PERS. (Gov. Code, § 20460.)
4. The City of Bell is a public agency contracting with PERS for retirement benefits for its eligible employees.
5. Respondent was an employee of the City of Bell. On an unspecified date, Respondent was elected as a member of the City Council. Effective March 19, 2001, Respondent elected optional membership in PERS as a City Council member, pursuant to Government Code section 20322. Respondent served as a City Council

member from March 19, 2001, until February 28, 2011. Respondent's only PERS service credit is related to her employment as a City Council member.

6. On February 5, 2007, as she was approaching the completion of her sixth year as a City Council member, Respondent signed an Election to Purchase ARSC by which she elected to purchase five years of "additional retirement service credit" (ARSC) for a total lump-sum payment of \$61,072.79. On or about February 9, 2007, PERS received a check from the City of Bell, made payable to PERS and drawn on the City's bank account, in the amount of \$61,072.79.

7. In March 2011, PERS received a Service Retirement Service Application signed by Respondent and dated March 8, 2011. By this application, Respondent requested service retirement with an effective date of February 28, 2011.

8. PERS sent Respondent a letter dated May 31, 2011, regarding the compensation reported by the City of Bell on her behalf as a City Council member. The letter notified Respondent of PERS' determination that "\$673 per month was the highest supportable payrate for City Council Members at the time of [her] retirement," and that her compensation associated with services to certain city-related boards, commissions and/or authorities would not be included in determining her retirement allowance, because such compensation "fails to meet the definition of special compensation or payrate." (Exh. 4.) For those reasons, PERS would "use \$673 as the final compensation to calculate [her] retirement allowance." The letter notified Respondent of her appeal rights.

9. In addition, the May 31, 2011 letter noted that Respondent's account had been credited with five years of ARSC, but, as of May 31, 2011, PERS had not yet determined whether or not the City paid for the costs associated with the purchase. The letter advised that no adjustment would be made to Respondent's account regarding the ARSC at that time. However, PERS was reserving the right to remove the five years of ARSC from Respondent's account and refund the purchase price to the City if the purchase was later held by any court to be unlawful, unauthorized by the City Council, and/or the result of excessive and wasteful compensation.

10. By letter dated June 3, 2011, and attached documents, PERS notified Respondent that she was being released on to the retirement roll with a monthly retirement benefit of \$196.09, based on a final compensation amount of \$673 per month. Her retirement benefit was based on 10.036 years of normal service credit and 5.000 years of ARSC credit.

11. By letter dated June 30, 2011, Respondent timely requested a hearing to appeal PERS' decision that her final compensation could be no higher than \$673 per month, and that her compensation from city-related boards, commissions, and authorities could not be used in determining her retirement allowance.

12. By letter dated June 29, 2012, PERS notified Respondent of its preliminary determination that her purchase of five years of ARSC was invalid and unlawful because it was paid for by the City of Bell with city funds, and not by Respondent herself, and that the purchase must be rescinded. PERS would make appropriate corrections to Respondent's account and the City's account. The letter advised that the five years of ARSC previously credited to Respondent's account would be removed, resulting in a reduction of the total service credit that could be used to calculate her retirement allowance. If PERS' preliminary determination became final, Respondent's total service credit would be reduced to 10.036 years and her monthly retirement benefit would be reduced to \$130.88 per month. The letter advised Respondent she could submit additional information and documentation for PERS to consider before issuing its final decision, by July 29, 2012.

13. By letter dated July 25, 2012, Respondent requested that the issue regarding the purchase of ARSC "be consolidated with the pending administrative hearing." (Exh. 8.) The letter did not include any additional information or documents regarding the ARSC purchase.

14. By letter dated January 25, 2013, PERS notified Respondent of its final decision to rescind the ARSC purchase because it was paid for using funds from the City of Bell and, therefore, unlawful under the PERL. The letter advised that PERS would rescind the purchase and make appropriate corrections to Respondent's account and the City of Bell's account. The five years of ARSC previously credited to Respondent's account would be deleted. Respondent's corrected service credit total would be 10.036 years and her corrected retirement benefit would be \$130.88 per month. The letter advised Respondent that PERS would also seek to recover from her all overpayments made on or after February 28, 2011. The letter acknowledged PERS' receipt of Respondent's letter dated July 25, 2012. PERS found, however, that Respondent's letter did not clearly state that she was appealing the ARSC determination, and it did not include a factual or legal basis for such an appeal. Therefore, the January 25, 2013 letter notified Respondent of her right to appeal the ARSC determination.

15. By letter dated February 20, 2013, Respondent timely requested a hearing to appeal PERS' decision that the ARSC purchase was unlawful and must be rescinded.

Issues Presented

16. Based on the Statement of Issues and Respondent's appeal letters, the two issues presented for decision in this matter are: (1) Whether Respondent's retirement allowance should be calculated using a "final compensation" amount of

\$673 per month; and (2) Whether the purchase of five years of ARSC for Respondent was unlawful and must be rescinded.¹

Respondent's "Final Compensation"

17. Under the PERL, the amount of a member's service retirement allowance is calculated by applying a percentage figure, based upon the member's age on the date of retirement, to the member's years of service and the member's "final compensation." A member's "final compensation" is determined, in part, by determining a member's "compensation earnable." To determine a member's "compensation earnable," PERS reviews the payroll reported by the employer to determine whether the payroll or portion thereof constitutes "payrate" or "special compensation."

18. Lolita Lueras has been employed by PERS since December 2004. Her current position is Retirement Program Specialist II (RSP II) in the Compensation and Employer Review Unit. Her duties as an RSP II include reviewing and analyzing employer compensation and related documents to determine a member's permissible final compensation under the PERL. Lueras' testimony and written declaration established the underlying facts of PERS' determination that Respondent's permissible "final compensation" was \$673 per month.

19. The City of Bell's contract with PERS provided for a 12-month final compensation period. Thus, Respondent's final compensation was determined based on her highest consecutive 12 months of "compensation earnable" as a City Council member. Lueras reviewed the compensation reported by the City of Bell for Respondent to determine whether it qualified as "payrate" or "special compensation." (Gov. Code, § 20636.) The City of Bell reported "zero" as the amount of "special compensation" for Respondent. Consequently, in order to be considered as "compensation earnable," Respondent's compensation amounts needed to qualify as "payrate."

¹ Among the various statutes cited in the Statement of Issues are Government Code sections 7522.70 and 7522.72, which generally provide for the forfeiture of retirement rights and benefits of public officials convicted of offenses related to the performance of their official duties. (Exh. 1, pp. 12-14.) The Statement of Issues contains no allegations that directly implicate sections 7522.70 or 7522.72, and there has been no request to amend the pleading. However, those statutes were referenced in prehearing motions and proceedings, and in the written briefs of the parties, and were indirectly addressed by some of the evidence presented at the hearing. Having now reviewed the entire record, the ALJ concludes that sections 7522.70 and 7522.72 are inapplicable and not necessary to resolve the two issues raised by the Statement of Issues, as set forth in Factual Finding 16.

20. In determining a member's "payrate" or base pay, PERS reviews appropriate documentation to determine whether the reported compensation is consistent with "the normal 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).). Lueras determined that Respondent's full-time position was that of a City Council member. Her elected position as a City Council member was deemed to be a full-time position pursuant to Government Code section 20899.

21. (A) Lueras determined that the normal rate of pay or base pay of City Council members was \$673 per month. The City of Bell did not have a publicly available pay schedule for its City Council members. PERS was provided with copies of the City's charter and ordinances that set the pay for City Council members. The \$673 amount was established by the Bell City Charter, the salary limitations of Government Code section 36516, and the City's Ordinance Nos. 1040 and 1139. Lueras deemed the City Charter and Ordinance provisions to be the only publically available pay schedules for City Council members.

(B) Section 502 of the Bell City Charter provides, in pertinent part: "The members of the City Council shall receive compensation for their services 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." (Exh. 29.)

(C) Government Code section 36516 sets forth a schedule of salaries for city council members within a general law city, based on the city's population. Section 36516, subdivision (a)(2), sets the salaries of city council members as follows: \$300 per month for cities with a population up to 35,000; \$400 per month for cities with population over 35,000 and up to 50,000; \$500 per month for cities with population over 50,000 and up to 75,000; \$600 per month for cities with population over 75,000 and up to 150,000; \$800 per month for cities with population over 150,000 and up to 250,000; and \$1,000 per month for cities with population over 250,000. In addition, section 36516 sets limitations on salary increases. Subdivision (a)(4) provides that the salary of council members may be increased beyond the amounts stated in subdivision (a)(2), by an ordinance or 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 salary in effect when the ordinance or amendment is enacted."

(D) The City's Ordinance No. 1040, which became effective on April 14, 1992, set the salary of City Council members at \$434 per month. The City's Ordinance No. 1139, dated March 5, 2001, increased the salary of City Council members to \$673 per month, "as prescribed in Section 36516 of the California Government Code." (Exh. 28, p. 484.) Lueras concluded that the monthly salary of

\$673 was based on the last valid ordinance setting City Council member salaries (e.g., Ordinance No. 1139) and complied with the salary limitations of Government Code section 36516.

22. (A) The City's Ordinance No. 1158, dated January 31, 2005, provided for an increase in the salary of City Council members to \$1,332 per month. Lueras reviewed Ordinance No. 1158 and concluded that it did not constitute a valid, publicly available pay schedule for purposes of determining Respondent's "payrate." The \$1,332 amount was not consistent with the salaries established by Ordinance Nos. 1040 and 1139, and was not consistent with the limitations on salaries and salary increases allowed under Government Code section 36516.

(B) Ordinance No. 1158 indicates that the increase in monthly salary to \$1,332 was justified and appropriate because: (1) the last salary adjustment for City Council members occurred in April 1991, when the salary was raised to \$673 per month; (2) Government Code section 36516 allowed city council salaries to "be increased by up to 5% per calendar year from the date of the last salary adjustment; and (3) the updated salary of \$1,332 per month was the result of "14 calendar years worth of salary adjustments (April, 1991 through April, 2005) at 5% per calendar year." (Exh. 28, p. 488.) Ordinance No. 1158 is based on incorrect information. Specifically, the last salary adjustment to \$673 per month occurred in March 2001 (by Ordinance No. 1139), and not April 1991. Thus, the correct period for a salary adjustment, if any, allowed under Government Code section 36516 would be March 2001 to April 2005, and not the 14-year period of April 1991 to April 2005. Moreover, the increase in salary from \$673 to \$1,332 over the four-year period March 2001 to April 2005 exceeds the five-percent limit on salary increases allowed under Government Code section 36516.

23. In addition to Respondent's compensation as a City Council member, the City of Bell also reported the compensation Respondent received from the following municipal commissions and agencies: Community Redevelopment Agency, Public Financing Authority, Surplus Property Authority, Community Housing Authority, Planning Commission, and Solid Waste Authority (collectively, Municipal Agencies).

24. PERS reviewed Respondent's additional compensation from the Municipal Agencies and determined that it could not be included in the calculation of her compensation earnable because it did not qualify as "payrate" or "special compensation." The additional compensation was in excess of the normal pay rate or base pay for the position of City Council member, discussed in Findings 20-22, above. The Municipal Agency compensation represented compensation for services in excess of Respondent's full time position as a City Council member and constituted overtime. (Gov. Code, § 20635.) The additional compensation was also in excess of the payrate or base pay of similarly situated member of the same group or class of employment. Furthermore, no evidence was presented establishing that any of the

Municipal Agencies was a contracting agency with PERS or otherwise participated in or made contributions to PERS on Respondent's behalf. The testimony of Lueras and Rebecca Valdez, a City of Bell Senior Human Resources Analyst, established that only the City of Bell participated in PERS as a contracting agency and employer, and there was no separate contract between PERS and the Municipal Agencies.

Additional Retirement Service Credit (ARSC)

25. ARSC was a "service credit option which [allowed] active [PERS] members in compensated employment the opportunity to purchase 'additional retirement service credit' that [could] be applied toward retirement, which [might] result in a higher monthly pension." (Exh. 26.) The option to purchase ARSC was available to eligible PERS members starting in 2003 and was discontinued effective January 1, 2013.

26. Government Code section 20909 authorized the purchase of ARSC. Subdivision (a) provides: "A member who has at least five years of credited state service, may elect, by written notice filed with the board, to make contributions pursuant to this section and receive not less than one year, nor more than five years, in one-year increments, of additional retirement service credit in the retirement system." Section 20909 was enacted in 2003 by Assembly Bill 719. The legislative history indicates that the purchase of ARSC was intended to be "cost neutral to employers" and that "[t]he member would pay the full present value cost of the additional service credit." (Exh. 25, p. 435.)

27. PERS determined that Respondent's purchase of five years of ARSC was unlawful because it was paid for by the City of Bell with city funds. Government Code section 20909 and its legislative history makes clear that employers were not allowed to purchase ARSC for its employee-members.

LEGAL CONCLUSIONS

Respondent Not Present

1. Respondent was not present at the hearing but was represented by her counsel, Leo Moriarity. At the start of the hearing, Respondent's counsel objected to the hearing going forward without Respondent present. The objection was overruled. A respondent does not need to be personally present at an administrative hearing if he or she is represented by an attorney. (*Arnett v. Office of Administrative Hearings* (1996) 49 Cal.App.4th 332, 339-342.)

Burden of Proof

2. 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.) In *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051, fn. 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. When a person seeks to establish eligibility for a government benefit or service, the burden of proof is on him or her to establish such eligibility. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161; *Greator v. Board of Admin.* (1979) 91 Cal.App.3d 54, 57.) Where a change in the status quo is sought, the party seeking the change has the burden of proving that the change is necessary. (Evid. Code, §§ 115 and 500.)

4. In addition, where PERS has made a determination under the PERL or accompanying regulations, or has interpreted the PERL or regulations, courts have generally accorded great weight and deference to such determinations and interpretations, 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. Based on the foregoing, the burden of proof in this case is as follows: (1) As to PERS' determination that Respondent's final compensation amount is \$673 per month, Respondent bears the burden to prove by a preponderance of the evidence that she is entitled to a final compensation amount greater than \$673 per month; and (2) As to PERS' determination to rescind the ARSC purchase, PERS bears the burden to prove by a preponderance of the evidence that rescinding the ARSC purchase is necessary.

6. As discussed below, Respondent's appeals shall be denied. Respondent did not meet her burden of proving by a preponderance of the evidence that her "final compensation" should be an amount greater than \$673 per month. PERS, however, did meet its burden of proving by a preponderance of the evidence that the ARSC purchase was unlawful and must be rescinded.

Final Compensation Generally

7. Under the PERL, an employee's compensation for use in the calculation of a pension benefit "is not simply the cash remuneration received, but is exactly defined to include or exclude various employment benefits and items of pay." (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 198.) What benefits and items

of pay constitute "compensation" and "compensation earnable" is crucial to the computation of an employee's ultimate pension benefits. The pension is calculated to equal a certain fraction of the employee's "final compensation" which is multiplied by a fraction based on the age and length of service. (*City of Sacramento v. Public Employees' Retirement System* (1991) 229 Cal.App.3d 1470, 1478 (fns. omitted).)

8. Final compensation is determined, in part, by determining a member's compensation earnable. "Compensation" is generally defined as "the remuneration paid out of funds controlled by the employer in payment for the member's services performed during normal working hours." (Gov. Code, § 20630, subd. (a).) "Compensation earnable" consists of "payrate" or "special compensation" of the member. (Gov. Code, § 20636, subd. (a).)

9. "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).)

10. 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).)

11. 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.)

12. 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. (Exh. 23.)

13. The PERS system, by 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

14. The preponderance of the evidence in this case supports PERS' determination to use a "final compensation" amount of \$673 per month to calculate Respondent's retirement allowance. Respondent failed to establish how her base salary as a City Council member could be greater than \$673 per month, as dictated by Government Code section 36516, the Bell City Charter, and Ordinance No. 1139. The only ordinance in which a base salary greater than \$673 per month was approved, Ordinance No. 1158, was proven to be inconsistent with the Bell City Charter and Government Code section 36516, as well as being premised on incorrect facts, and therefore invalid.

15. Respondent similarly failed to establish that the additional compensation associated with her services for the Municipal Agencies could be considered part of her "final compensation." All of that additional compensation appears to have violated Government Code section 36516, as that statute interacted with Section 502 of the Bell City Charter. It cannot be concluded that any compensation received in violation of the law should be considered part of "final compensation" for calculating a PERS retirement allowance. Specifically:

A. Pursuant to Government Code section 20899, Respondent's position as a 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 Government Code 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 she was compensated by her base salary, was her service during her normal working hours. Respondent presented no evidence indicating otherwise. Pursuant to Government

Code section 20635, overtime is excluded from final compensation. In this case, Respondent's full-time position was as a City Council member. Her service for the Municipal Agencies should be seen as additional part-time service. If Respondent's service on the Municipal Agencies was part of her position as a City Council member, such begs the question why she would be entitled to additional compensation.

B. No evidence was presented establishing that the additional compensation Respondent received from the Municipal Agencies was based on publicly available pay schedules. 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. Further, it was not 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 be required by state or federal law. In this case, no labor policy or agreement was presented. Not only was the additional compensation not required by state or federal law, it actually violated state and municipal law.

C. 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. 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.

16. Respondent had the burden to prove by a preponderance of the evidence that she was entitled to a "final compensation" greater than \$673 per month. She failed to meet that burden. PERS' decision to use \$673 per month as the "final compensation" amount to calculate Respondent's retirement allowance shall be affirmed. Respondent's appeal on this issue shall be denied. (Factual Findings 1-24; Legal Conclusions 1-15.)

Additional Retirement Service Credit (ARSC)

17. The preponderance of the evidence supports PERS' decision to rescind the purchase of five years of ARSC for Respondent. The purchase was unlawful, under the PERL, because it was paid for by the City of Bell with city funds, and not by Respondent herself and her own funds. Government Code section 20909 requires that the PERS member will make the additional contributions associated with purchasing the ARSC. Respondent offered no evidence proving that the five years of ARSC was paid for by anything other than City of Bell funds. Nor was any evidence

presented to support a claim that the \$61,072.79 paid by the City was somehow part of Respondent's compensation as a City Council member.

18. Having determined that the ARSC purchase was unlawful under the PERL, PERS has a duty to correct the situation. PERS is required "to correct all actions taken as a result of errors or omissions of . . . any contracting agency, . . . or this system." (Gov. Code, § 20160, subd. (b).) Once an error is discovered, PERS is required to take action to correct it and is permitted to pay only those benefits authorized under the PERL. Further, where the PERS system has made an erroneous payment to a member, the right to collect expires three years from the date of payment. (Gov. Code, § 20164.) PERS is entitled to recover from Respondent any and all overpayments, as authorized by law.

19. Under these circumstances, it was established that the purchase of five years of ARSC for Respondent was unlawful under the PERL. The crediting of Respondent's account with five years of ARSC credit was in error. PERS may take action to correct the error, including removing the five years of ARSC credit from Respondent's account and seeking to recover any resulting overpayment from Respondent. Respondent's appeal on this issue shall be denied. (Factual Findings 6, 12-15, 25-27; Legal Conclusions 1-6, 17-18.)

Vested Pension Rights

20. Respondent argues that the proposed reduction in her benefits violates her vested pension rights. Respondent cites *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 a comparable new advantage. Respondent also cites *Dunham v. City of Berkeley* (1970) 7 Cal.App.3d 3d 508, 513, 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 her final compensation amount is tantamount to changing Respondent's retirement benefits before and after her retirement became effective.

21. Respondent's argument is without merit. There is nothing in the record indicating that any portion of the PERL was changed to Respondent's detriment or that PERS' decision regarding her final compensation amount has caused such a result. The situation in this case simply involves the way in which PERS has interpreted the compensation Respondent received from the City of Bell and how the PERL is applied to it. The cases cited by Respondent do not apply.

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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 Municipal Agencies because the City made contributions to PERS for years based on the higher amounts of compensation and she relied to her detriment that she 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. In this case, Respondent did not establish each of the required elements. Respondent did not testify in this matter, nor was any evidence submitted by her counsel on this point. No evidence established that Respondent relied on any actions of the City or PERS for purposes of her pension benefits or retirement planning. 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 her final compensation. If she was so ignorant, the burden was on Respondent to establish the same, which she failed to do.

25. Respondent's estoppel argument is also 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 she received from the Municipal Agencies. 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 her final compensation is not based on compensation that the City was not legally permitted to pay her. In fact, it 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.

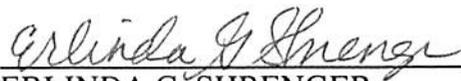
26. Respondent argues there has been an unreasonable delay in initiating this proceeding, which has caused her prejudice, and that the doctrine of laches applies. (*Gates v. Dept. of Motor Vehicles* (1979) 94 Cal.App.2d 921, 925; *Brown v. California State Personnel Board* (1985) 166 Cal.App.3d 1151.) 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 February 2011, but was involved in correspondence with PERS in 2011 and 2012 concerning her final compensation and her 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 she 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, she failed to establish the required elements of laches.

ORDER

Respondent's appeals are denied. PERS' determinations that Respondent's final compensation for calculating her retirement allowance was \$673 per month, and that the purchase of five years of ARSC for Respondent was unlawful and must be rescinded, are affirmed.

DATED: April 22, 2015


ERLINDA G. SHRENGER
Administrative Law Judge
Office of Administrative Hearings