ATTACHMENT C

RESPONDENT'S ARGUMENT

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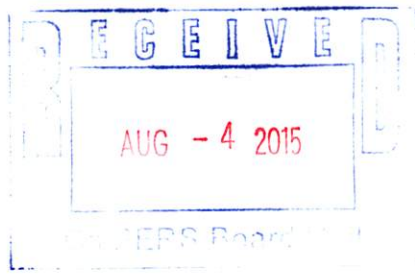

July 27, 2015

Ms. Cheree Swedensky
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Matter of the Final Compensation Calculation of
JULIA ERICKSON, Respondent and CITY OF VALLEJO, Respondent

The purpose of this correspondence is to request the Board reject the findings of the Administrative Law Judge (ALJ) (OAH No. 2014051049) and include the value of the City of Vallejo's General Flex Benefit (hereinafter Management Incentive Pay as characterized by CalPERS) in the final retirement compensation calculation of Ms. Julia Erickson. Such action is appropriate and required pursuant to the California State Constitution Article XVI, Section 17:

> The member of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. **A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.**

To allow a CalPERS staff member unbridled discretion to disregard years of employer promises and assurances means no CalPERS member can be secure in their retirement. It is especially egregious Ms. Erickson's retirement allowance was reduced against the wishes of her employer, the City of Vallejo, and the reduction was made after she retired and the City was unable to take corrective action (assuming corrective action was required).

The Administrative Law Judge (ALJ) upheld CalPERS refusal to consider Ms. Erickson a "management employee" entitled to Management Incentive Pay by completely disregarding:

- For over 17 years Ms. Erickson received written and verbal promises the value of Vallejo's General Flex Benefit (Management Incentive Pay) would be included in her retirement allowance.

- For over 17 years, Ms. Erickson had no reason to believe the General Flex Benefit (Management Incentive Pay) would not be included in her retirement allowance and planned her retirement based on that belief.
- For over 17 years every similarly situated Vallejo employee received and continues to receive the General Flex Benefit (Management Incentive Pay) as part of their retirement allowance.
- For over 17 years Ms. Erickson and the City made all required CalPERS retirement contributions related to receipt of the General Flex Benefit (Management Incentive Pay).
- Ms. Erickson is the only Vallejo employee adversely affected by CalPERS' decision regarding the General Flex Benefit (Management Incentive Pay) and the CalPERS decision was made after Ms. Erickson retired when it was too late for the City to implement corrective action.
- Ms. Erickson has been the subject of disparate treatment by CalPERS.
- CalPERS decision to deny Ms. Erickson a retirement allowance including the value of the General Flex Benefit (Management Incentive Pay) was challenged by the City but CalPERS staff ignored the City's position.
- The inclusion of the General Flex Benefit in Ms. Erickson's retirement allowance is unopposed by the City.
- A 17 year delay by CalPERS is asserting their rights (assuming there are any rights) clearly is unreasonable and prejudiced Ms. Erickson for the remainder of her life.

Additionally, the ALJ refused to admit evidence of other relevant issues including, vesting, estoppel and laches all of which are basic tenants of equity and fairness.

BACKGROUND

Ms. Julia Erickson became a permanent employee of the City of Vallejo on January 4, 1982 and worked continuously with the City until her retirement on October 5, 2012.

Ms. Erickson was promoted to Executive Assistant to the City Manager on March 22, 1995. On that date, she became an unrepresented (non-unionized) management employee whose compensation and benefits were authorized by City Council Resolution upon recommendation of the City Manager.

As a "management employee", Ms. Erickson was entitled to Vallejo's "General Flex" benefit (now termed Management Incentive Pay by CalPERS). Initially the General Flex benefit allowed exempt employees to select either 120 hours of additional base pay or 120 hours of additional leave, or some combination thereof. However, in 1997, CalPERS notified the City that the General Flex benefit would not be considered "compensation earnable" for computation of retirement allowances if "cash" or "non-cash" alternatives were permitted. In response, the City eliminated the additional vacation alternative and

all affected employees became entitled to 120 hours of additional base pay payable in equal installments in the employees' regular paycheck.

On October 31, 1997 CalPERS notified the City that the modified cash only Management Incentive Pay was accepted for retirement purposes (compensation earnable) "in accordance with CalPERS' regulations implementing Government Code Section 20023...". When making this determination, CalPERS knew or should have known Ms. Erickson was receiving Management Incentive (General Flex benefit) pay.

Subsequent to her appointment as Executive Assistant to the City Manager, Ms. Erickson received approximately 440 "pay stubs" reflecting payment of the "PERSABLE" General Flex benefit with CalPERS contributions deducted. Additionally, she received approximately 17 letters from the City's Human Resources Department advising her that the General Flex benefit was subject to CalPERS contributions and was CalPERS included retirement benefit.

Yet, in spite of 17 years of verbal and written promises and retirement system contributions, on November 28, 2012, CalPERS notified Ms. Erickson "the reported (General Flex – Management Incentive) payments do not meet the definition of "compensation earnable" as provided in Government Code (GC) Section 20636 . . ." (because) "Your position title at retirement was Executive Assistant to the City Manager which does not appear to be a management position.

On July 23, 2012, the CalPERS assumptions regarding Ms. Erickson's duties were challenged by the City of Vallejo; however, CalPERS staff ignored the City's position even though Vallejo Council Resolution 09-317 N.C. specifically identifies the "Executive Assistant to the City Manager" as an "Executive Management Employee".

DECISION MAKING

The City of Vallejo, not CalPERS, must be the final arbitrator of employee compensation elements. It simply is not reasonable for a CalPERS staff member, acting with limited information (apparently gleaned primarily from web sites) and admittedly no regulatory guidance to understand complex organizational and compensation philosophies of hundreds of contracting agencies.

Significantly, CalPERS has not produced any written policy, procedure or regulation giving CalPERS staff authority to independently determine who is or is not a management employee. The sole CalPERS witness in this matter (Karin Zimmerman) testified no such policy, procedure, or law exists. Therefore, according to CalPERS, major decisions regarding pension calculations for long-term municipal employees are made at the sole and unbridled discretion of CalPERS staff members without any guidance, regulatory or statutory authority.

Ms. Zimmerman testified during the administrative hearing that Ms. Erickson came to her attention due to a CalPERS audit. Yet, Ms. The witness knew nothing about the audit, did not know who was interviewed and could not testify as to the validity of the audit process. Furthermore, the witness was unable to reconcile the undisputed fact CalPERS has included the value of Management Incentive Pay in the final compensation of every retired similarly situated employee. Ms. Erickson is the only City of Vallejo employee adversely affected by such a CalPERS action. In fact, Ms. Zimmerman testified the Vallejo City Clerk does not hold a management position entitling her to receive a retirement allowance that includes management incentive pay, yet every active and retired City Clerk continues to receive such compensation. Ms. Zimmerman's testimony was not credible.

CalPERS' argument "Management Incentive Pay for Ms. Erickson did not meet the definition of Management Incentive Pay as set forth in the PERL and corresponding regulations" is simply inaccurate and untrue. One only need look at the vague and limited description of Management Incentive Pay on Page 6 of CalPERS Closing Argument to make that determination. Nowhere is the term "management employee" specifically described or defined other than to say:

> "Management Incentive Pay -- Compensation granted to management employees in the form of . . . extra pay due to the unique nature of their job. ."

For the entire time Ms. Erickson served as Executive Assistant to the City Manager the City's human resource professionals classified her as a "management employee" and that classification decision was approved by the City Council.

As described in our administrative hearing opening brief and undisputed by CalPERS, CalPERS notified the City that the modified "cash only" Management Incentive Pay was accepted for retirement purposes (compensation earnable) "in accordance with CalPERS' regulations implementing Government Code Section 20023...". When making that determination over 17 years ago, CalPERS knew or should have known Ms. Erickson was receiving Management Incentive (General Flex benefit) Pay but did nothing to alert either the City or Ms. Erickson of a potential problem with Ms. Erickson's final compensation calculations. For the next 17 years, both the City of Vallejo and Ms. Erickson made and CalPERS accepted retirement contributions based on the inclusion of Management incentive Pay in her final retirement compensation.

In spite of 17 years of verbal and written promises and retirement system contributions, on November 28, 2012, CalPERS notified Ms. Erickson "the reported (General Flex – Management Incentive) payments do not meet the definition of "compensation earnable" as provided in Government Code (GC) Section 20636 . . ."

Of course, had the City been notified of CalPERS position prior to Ms. Erickson's retirement corrective action could have been taken by simply rolling the value of

Management Incentive Pay into Ms. Erickson's regular base pay. But CalPERS waited until after Ms. Erickson retired when it was too late to correct the problem.

MS. ERICKSON WAS A MANAGEMENT EMPLOYEE

Ms. Erickson was classified by the City of Vallejo as a "management employee" for over 17 years. She was one of 12 City employees out of 500 not represented by organized labor. According to a July 23, 2012 letter from Vallejo's Human Resources Director to CalPERS, "The Position of Executive Assistant to the City Manager has supervisory responsibility and acts independently on behalf of the City Manager. Ms. Erickson is considered a management employee and as such her Management Incentive Pay (General Flex Benefit) has been correctly reported ..."

Employee duties and classifications are a local government responsibility and CalPERS has not cited any law, rule, or regulation that allow CalPERS to second-guess such determinations based on position titles. Other than Ms. Zimmerman's unsupported testimony, CalPERS has provided no evidence to refute the City's position that Ms. Erickson was a "management employee" and no authority for a CalPERS staff member to make such a determination based solely on duty title.

BASE PAY AS AN ALTERNATIVE THEORY

The General Flex Benefit was paid to every unrepresented employee on a regular recurring basis ("paid in equal installments in the employees regular paycheck") without additional duties, additional work hours, or other specialized or unique requirements. Except for Ms. Erickson, every retiring Vallejo exempt employee and CAMP (Confidential, Administrative, Management and Professional) union member, including the City Clerk (who the CalPERS administrative hearing witness testified was not a Management Employee), had Management Incentive (General Flex Benefit) pay included in retirement allowances.

According to Government Code Section 20636, "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. "Payrate," for a member who is not in a group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours.

It is undeniable Ms. Erickson was paid Management Incentive (General Flex benefit) pay in cash for services rendered on a full-time basis during normal working hours the same as all other members of her class or group and that Management Incentive (General Flex benefit) pay was reflected on a publically available pay schedule.

VESTING

Completely disregarded by the ALJ, Ms. Erickson clearly has vested rights in the rules in place when she was appointed Executive Assistant to the City Manager in 1995. The CalPERS publication "Vested Rights of CalPERS Members" that states in pertinent part:

> "By statute and contracts, public employers, not CalPERS, decide how much of an employee's compensation will be paid currently and how much will be deferred and paid in the future. Simply put, **employers grant the benefits owed to CalPERS members.** CalPERS in turn serves as the trustee of the trust created to fund these benefits, through the prudent administration and investment of the retirement fund. The rights of all CalPERS members are established by statute. In the case of local agencies, members' rights are also governed by the contract between the agency and CalPERS. When contracting with CalPERS, local agencies may choose from a menu of options. **Benefits for CalPERS members are often the product of collective bargaining."**
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> "California law clearly establishes that public employee retirement benefits are a form of deferred compensation and part of the employment contract."
>
> **"The California Supreme Court long ago established that a promise made by a public employer to its employees is a promise the employer must keep.** In other words public employers in California are legally required to honor promises to current and former employees..."
>
> "A public employee's right to a retirement benefit earned during employment is generally a vested right."

There is absolutely no dispute that Ms. Erickson earned and paid for the inclusion of Management Incentive (General Flex benefit) Pay in her retirement allowance.

CONCLUSION

Ms. Erickson is entitled to a retirement allowance that includes the value of Management Incentive (General Flex Benefit) payments she received for over 17 years as Executive Assistant to the City Manager.

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