

ATTACHMENT C
RESPONDENT'S ARGUMENT

CalPERS BOARD OF ADMINISTRATION
Case No. 2013-0549 - OAH NO. 2013070971
Respondent's Argument

The Foothill-De Anza Community College District ("District") respectfully requests that the CalPERS Board of Administration ("Board") reject the Proposed Decision in this case ("Proposed Decision") and grant its appeal to provide eligibility for certain District retirees under the Public Employees' Medical and Hospital Care Act ("PEMHCA"), because the Proposed Decision does not address the fact that the District relied to its detriment on misrepresentations made by CalPERS in choosing to contract for PEMHCA coverage, and so is entitled to this remedy under the doctrine of promissory estoppel. The Proposed Decision omits any analysis of the District's promissory estoppel argument, and instead analyzes an equitable estoppel claim that the District never made. As explained below, granting this remedy would not contravene the statute or impose any cost on CalPERS or the tax-paying public.

I. Background

Prior to 2012, the District provided health benefits to its several thousand employees and retirees through a self-funded health plan. Under collective bargaining agreements with unions representing District employees, certain full-time employees hired prior to 1997 who work for the District for 20 or more years qualify for lifetime retiree health coverage when they leave District employment. (These employees are referred to in this case as "20-year retirees.") When the District decided to replace its self-funded health plan with insured coverage, a CalPERS representative was invited to present information about PEMHCA coverage to the District's benefits committee (the "JUMBLE"). The District also invited the CalPERS representative to a "town hall" meeting, where employees who had been promised health benefits under collective bargaining agreements could ask questions about how their eligibility and coverage would change, if the District switched to PEMHCA. A major concern for the District was that all employees and retirees who were eligible for coverage under the self-funded plan would remain eligible under PEMHCA, and that the District could continue to meet its obligations to long-term, loyal employees that were made in collective bargaining agreements, if it switched to PEMHCA.

The CalPERS representative who attended the JUMBLE and town hall meetings provided erroneous information about PEMHCA coverage to District and union staff, and District employees. (See Proposed Decision, *Legal Conclusions*, ¶21, at p. 15.) The PEMCHA statute uses the term "annuitant" (rather than "retiree") to describe eligible individuals who are not actively working for the State or a contracting agency. In the case of a contracting agency's former employee "annuitant" means "[a] person who has retired within 120 days of separation from employment with a contracting agency ... and who receives a retirement allowance from the retirement system provided by that employer..." (Gov. Code §22760(c).)

The CalPERS representative who presented information at the JUMBLE and town hall meetings, and the marketing materials he distributed, paraphrased these requirements for annuitant eligibility as: 1) the retiree must retire within 120 days of separation from employment, 2) the retiree must be receiving a monthly retirement check (or "warrant"), and 3) the retiree's former employer must be contracting with CalPERS for health benefits. On several occasions, District staff and union members specifically asked the CalPERS representative if the annuitant rules meant that 20-year retirees who had not yet begun receiving a retirement benefit from CalPERS or CalSTRS would be eligible for PEMHCA coverage; on each occasion, the CalPERS representative assured the District and union members that 20-year retirees would be eligible as annuitants, so long as they received a retirement check from any retirement plan sponsored by the District.

Based on the CalPERS representative's repeated assurances, the District adopted a pension plan, known as the "401A Plan" because it complies with the tax-qualification requirements of Internal Revenue Code section 401(a). The purpose of the 401A Plan was to provide a District-sponsored retirement plan and check for 20-year retirees who are eligible for lifetime District health coverage under

collective bargaining agreements, and who are not receiving a retirement check from CalPERS or CalSTRS. These 20-year retirees were covered under the District's self-funded health plan, and the District relied on the CalPERS representative's assurances that they would continue to be covered under PEMHCA, so long as they received a retirement check from a qualified plan, like the 401A Plan, sponsored by the District. The 401A Plan also covers retired District Board of Trustee members, who qualify for retiree health coverage.

Throughout the contracting process, the CalPERS representative assured the District that 20-year retirees would be eligible under PEMHCA, so long as they received a retirement check from a qualified retirement plan sponsored by the District. It was not until approximately six weeks before the District's first PEMHCA contract took effect that CalPERS notified the District in an email that the 20-year retirees who were receiving a retirement check from the 401A Plan would not be eligible because the 401A Plan was not their "true retirement program." The email did not cite a statute, regulation, Circular Letter, or other authority on which CalPERS based its view that the 20-year retirees would not be eligible for PEMHCA coverage. The District responded that its staff had reviewed the applicable eligibility requirements and continued to believe that the 20-year retirees met them under the 401A Plan. Given the looming deadline for finalizing the contract, the District asked that someone with more authority at CalPERS review the issue. The CalPERS Chief of Health Contracts and Marketing responded by email that she had "vetted" the issue with "her management" and that the 20-year retirees were not eligible because "they are not current employees nor will they be retired on the contract effective date of July 1, 2012, and will not meet the 120 day rule provided by Government Code Section 22760(c)."

The Proposed Decision implies that the District is to blame for the fact that, prior to this email exchange in May 2012, no one at CalPERS was informed of the misrepresentations made by the CalPERS representative to District staff. (See Proposed Decision, *Legal Conclusions*, ¶21, at p. 15.) However, District staff had no reason to doubt the CalPERS representative, who was sent by CalPERS to provide information about PEMHCA coverage, when the District expressed interest in it. District staff reasonably presumed that the representative dispatched by CalPERS to explain the benefits, rules and other features of the PEMHCA program and answer questions about eligibility was professionally trained, and had a commanding knowledge of the eligibility rules.

The District's PEMHCA contract took effect on July 1, 2012, although 20-year retirees, and their spouses and domestic partners, were denied eligibility. The District filed an appeal, waited three years for a hearing, and now requests that the Board of Administration reject the Proposed Decision on the basis that it fails to address the District's claims.

II. The District is Entitled to Relief under the Doctrine of Promissory Estoppel

In its Closing Brief, the District explained that it relied to its detriment on the misrepresentations made by the CalPERS representative about eligibility for 20-year retirees when it chose to switch to PEMHCA coverage. In California, when a public agency makes a promise that is reasonably expected to induce action by another party, and the party who acts relies to its detriment on the promise, the promise is binding on the public agency under the doctrine of promissory estoppel. (See *Kajima/Ray Wilson v. L.A. County MTA* (2000) 23 Cal.4th 305, 310.)

The Proposed Decision ignores the District's promissory estoppel claim and instead provides an analysis of a (non-existent) claim for "equitable estoppel" which is a separate legal principle. The doctrine of promissory estoppel is "distinct from the ordinary equitable estoppel, since the representation is promissory, not a misstatement of an existing fact." (See *Cotta v. City & County of San Francisco* (2007) 157 Cal.App.4th 1550, 1566; *Panno v. Russo* (1947) 82 Cal.App.2d 408, 412.) In fact, some courts have held that California does not recognize an independent cause of action for equitable estoppel, because the doctrine of equitable estoppel acts "defensively only." (See *Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 782, *citing* 13 Witkin, Summary of Cal. Law, Equity, § 190.) The District did not make any argument based on the doctrine of equitable estoppel.

While acknowledging that the CalPERS representative provided erroneous information to the District, the Proposed Decision makes no mention of the uncontroverted evidence provided at hearing that the representative specifically advised the District, on more than one occasion, that 20-year retirees who were receiving a check under a "qualified retirement plan" like the 401A Plan would be eligible for PEMHCA coverage. The CalPERS representative who made these promises did not appear at the administrative hearing, despite the fact that CalPERS staff attorneys requested a continuance from the initial hearing date to accommodate the representative's schedule, on the basis that he was an essential witness. Given these circumstances, CalPERS cannot refute that the CalPERS representative made these promises to the District about coverage for 20-year retirees. As the evidence showed, these promises were intended to and did induce the District to elect to contract for PEMHCA coverage.

CalPERS marketed PEMHCA to the District as the best alternative for providing health coverage to District employees and retirees, with the aim of convincing the District to contract with CalPERS. Part of CalPERS' marketing strategy was to assure District and union staff, and the JUMBLE, that everyone who was eligible for coverage before the switch to PEMHCA would continue to be eligible under PEMHCA. The District reasonably relied on those assurances when it decided to switch to PEMHCA coverage. Then, after the District made the decision and terminated its self-insured plan, after open enrollment materials had been mailed out, when it was too late for the District to make a change, CalPERS decided the 20-year retirees would not be eligible for coverage after all. This left a group of 20-year retirees who were promised lifetime health coverage in the collective bargaining agreements they worked under for over 20 years, without access to coverage under the District's health plan. Under the doctrine of promissory estoppel as recognized by the California Supreme Court, the remedy of enforcement of CalPERS' promises on which the District relied to its detriment should be imposed.

Where the elements of promissory estoppel are met, a public agency may only avoid its application by showing that enforcement of the agency's promises would "defeat the effective operation of a policy adopted to protect the public." (See *Kajima/Ray Wilson v. L.A. County MTA* (2000) 23 Cal.4th 305, 316.)

Here, the PEMHCA statute was enacted to:

- (a) Promote increased economy and efficiency in state service.
- (b) Enable the state [and contracting agencies] to attract and retain qualified employees by providing health benefit plans similar to those commonly provided in private industry.
- (c) Recognize and protect the state's investment in each permanent employee by promoting and preserving good health among state employees. (Gov. Code §22751.)

There is nothing in the Proposed Decision to show that these purposes would be defeated if the promises made by CalPERS, on which the District relied, were enforced. To the contrary, providing coverage for 20-year retirees under PEMHCA will promote and preserve the good health of these former employees of the District, and thus further an express purpose of the statute.

The type of negative effects on the public that would outweigh the benefit of enforcing a public agency's promise involve costs that would "unduly punish[] the tax-paying public." For example, damages in a successful promissory estoppel claim were limited in order to protect the taxpaying public, which the Court found was the purpose of the competitive bidding statutes that the public agency failed to follow. (See *Kajima/Ray Wilson v. L.A. County MTA* (2000) 23 Cal.4th 305, 310.) Similarly, estoppel was not applied to enforce an arbitration award against the State of \$18 million because doing so would defeat the purpose of the Constitutional ban on "gifts of public funds." (See *Jordan v. Dept. of Motor Vehicles* (2002) 100 Cal.App.4th 431, 445.)

Here, there will be no cost to the tax-paying public if 20-year retirees are granted eligibility, because the District and the retiree pay the entire PEMHCA premium cost, and the District pays all administrative costs. The Proposed Decision does not list a public interest that can be protected only if CalPERS'

promises are not enforced. The Proposed Decision provides that "[o]ne purpose of PEMHCA is to retain qualified employees by making receipt of retiree health care benefits contingent upon an employee retiring within 120 days of separation from employment with the employer who provides the benefits." This misconstrues the statutory purpose set forth in Government Code section 22751: PEMHCA is intended to help the State and contracting employers "attract and retain qualified employees by providing health benefit plans similar to those commonly provided in private industry." Providing benefits on par with private industry in order to attract and keep good employees is not the same as trying to "retain" current employees by establishing eligibility rules for retiree health coverage. The latter is not an express purpose of the statute.

In determining that equitable estoppel does not apply to CalPERS, the Proposed Decision relies on a California Supreme Court case that recounted other cases in which public agencies were estopped from denying pension benefits that had been promised to public employees. (See Proposed Decision, *Legal Conclusions*, ¶19, p. 14, citing *Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 28.) Two of the decisions cited by the *Longshore* Court emphasized the unique importance of pension rights to an employee's well-being, which are similar in nature to health coverage, and which the Court distinguished from the retroactive compensation being sought by plaintiff Longshore. (See *Longshore*, 25 Cal.3d at 28.) The Court noted that, even in cases in which the potential injustice to public employees clearly outweighed any adverse effects on established public policy, "no court has expressly invoked principles of estoppel to contravene directly any statutory or constitutional limitations," such as the constitutional ban on payment by the State or a local government of retroactive compensation for work already performed by its employees. (See *id.*, citing *Driscoll v. City of Los Angeles* (1967) 67 Cal. 2d 297, 308-309; *Farrell v. County of Placer* (1944) 23 Cal. 2d 624, 630-631; *Baillargeon v. Dep't. of Water & Power* (1977) 69 Cal. App. 3d 670, 679-681; and *Crumpler v. Bd. of Admin.* (1973) 32 Cal. App. 3d 567, 584-585.)

In each of the cases cited by the *Longshore* Court, a public agency was estopped either from denying benefits to employees, or from barring a claim against it as untimely, because of erroneous representations or misconduct by representatives of the agency. In the first cited case, survivors of City employees were granted pension benefits on the basis that the City made promises on which the employees relied, and the City was estopped from barring the claims as untimely, although the City Charter's claims provisions still applied. (See *Driscoll v. City of Los Angeles*, 67 Cal. 2d 297, 308-309.) In the second cited case, the County was estopped from barring the plaintiffs' claims as untimely, on the basis of County representatives' conduct, and because the limitations period "is nothing more than a procedural requirement as to the agency, which, as to the claimant, may be excused by estoppel." (See *Farrell v. County of Placer* (1944) 23 Cal.2d 624, 630-631.) In the third cited case, a public employee was misled about her pension rights and the court held that, because granting the benefits posed no actuarial cost to the public agency, there was "no overriding public policy in need of protection," although the employee's tort claim was barred by the statute of limitations. (*Baillargeon v. Department of Water & Power* (1977) 69 Cal.App.3d 670, 681.) In the last cited case, estoppel was applied to prevent retroactive reclassification of certain public employees as "miscellaneous" rather than "safety" members. The court held that in matters "as important to the welfare of a public employee as his pension rights, the employing public agency 'bears a more stringent duty' to desist from giving misleading advice" and that "[g]ood faith conduct of a public officer or employee does not excuse inaccurate information negligently given." (*Crumpler v. Bd. of Admin.* (1973) 32 Cal.App.3d 567, 582.)

Accordingly, the Supreme Court case cited by the Proposed Decision, and the cases cited therein, do not support the statement that "estoppel does not apply to CalPERS" for which the Proposed Decision cited them. Rather, these cases provide additional support for the District's argument that the promises made by CalPERS, on which the District relied, should be enforced, particularly given the importance of health coverage to District employees' and retirees' welfare. These cases also show that, where, as here, there is no cost to the taxpaying public or to the public agency that made the promises, there is no overriding public policy in need of protection, and the public agency's promises may be enforced.

Finally, the Proposed Decision states that "[t]here is no evidence that the District would have totally abandoned the contract with CalPERS if it had known earlier that the 20-year retirees would not be covered under PEMHCA." (See Proposed Decision, *Legal Conclusions*, ¶25, p. 16.) While there is no way to prove what would have happened if the promises and misrepresentations about 20-year retirees' eligibility had not been made, the evidence shows that the District sought a health benefits plan that would provide coverage for all of its eligible employees and retirees, and chose to contract for PEMHCA based on assurances provided by the CalPERS representative that PEMHCA coverage would fulfill that requirement.

III. Granting This Remedy Would Not Contravene the Statute

The Proposed Decision's conclusion that 20-year retirees do not meet the statutory definition of "annuitant" is premised on the view that "a contracting agency may only have one retirement system for each employee for the purposes of annuitant eligibility under PEMHCA." (See Proposed Decision, *Legal Conclusions*, ¶18, p.14.) No statute, regulation, Circular Letter, case or other guidance is cited for this statement. In fact, for many employees of community college districts, membership in both CalPERS and CalSTRS is not uncommon, and both systems allow concurrent retirement.

The Proposed Decision also cites Government Code section 20303 as providing that "[p]ersons who are members of any other retirement or pension system' that is supported by a public entity and 'who are receiving credit in the other system for service are, as to that service excluded' from PEMCHA." (See Proposed Decision, *Legal Conclusions*, ¶12, p. 12.) This is interpreted in the Proposed Decision to mean that "PEMHCA allows for other retirement systems other than those identified under the regulations." (See Proposed Decision, *Legal Conclusions*, ¶12, p. 12.) However, Government Code section 20303 has no bearing on PEMHCA eligibility, because it applies to exclude employees from CalPERS retirement benefits only; the PEMHCA statutes begin at Government Code section 22750, and all of the statutory provisions are set forth in sections 22750 through 22948.

The Proposed Decision further provides that "when an employee receives a retirement allowance from another retirement system provided by the employer, it is contemplated that the employee must have received service credit in and can retire from only one retirement system for the purposes of PEMHCA." (See Proposed Decision, *Legal Conclusions*, ¶12, pp. 12-13.) No statute, regulation, Circular Letter, case or other guidance is cited for this statement. In fact, no legal citations (except inapplicable Government Code section 20303) are provided for any of the seven Legal Conclusions set forth in paragraphs 12 through 18 of the Proposed Decision, regarding what the statute means by "retirement system provided by the employer." Under the California Administrative Procedures Act, the Proposed Decision must include a written statement of the factual and legal basis for the decision. (Gov. Code. §§11425.10(a)(6); 11425.50(a).)

Further, the Proposed Decision does not apply this contemplated "service credit" rule to retired members of the District's Board of Trustees, and does not explain this omission. If the 401A Plan cannot be the "retirement system" for 20-year retirees, because it did not apply to them while they were working, the same should be true for retired Trustees, given that the 401A Plan did not apply to them while they were active Trustees. Yet the Proposed Decision concludes that the 401A Plan can be the Trustees' "retirement system" for purposes of annuitant eligibility. (See Proposed Decision, *Legal Conclusions*, ¶17, p. 14.)

Given that plans like the 401A Plan are applied by CalPERS as the retirement system for annuitant eligibility, and there is nothing in the statute or regulations that expressly prohibits treating the 401A Plan as the retirement plan of 20-year retirees for purposes of annuitant eligibility, granting the District's appeal and enforcing the promises made by CalPERS will not contravene the statute. Further, granting this appeal would not enlarge the powers of the Board, which, under PEMHCA, "shall have all powers reasonably necessary to carry out the authority and responsibilities expressly granted or imposed upon it under this part." (Gov. Code §22794.)

Finally, even if the granting of this appeal were a precedential decision, there is no potential for this situation to be repeated, because new supplemental defined benefit retirement plans for public employees, like the 401A Plan, are prohibited as of January 1, 2013 under the Public Employees' Pension Reform Act (PEPRA). (See Cal. Govt. Code § 7522.18.)

IV. The Proposed Decision Does Not Meet the Legal Requirements for California Administrative Agency Decisions

Because the District's promissory estoppel claim was completely ignored, and no legal support was cited as the basis for the interpretations of the statute made, the Proposed Decision does not meet the requirements under California law for a binding administrative agency decision. The California Supreme Court has ruled that an administrative agency's decision must "bridge the analytic gap between the raw evidence and ultimate decision or order" made by the agency. (*Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 779.) When the decision fails to do so, "a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency." (See *Topanga Assn. v. County of Los Angeles* (1974) 11 Cal.3d 506, 516.) An unsupportable administrative decision also fails to serve an important public relations function, because the decision will not "persuade the parties that administrative decision-making is careful, reasoned, and equitable." (See *id.* at 17.) The failure to analyze the District's promissory estoppel claim, and the failure to cite any legal basis for conclusions made about the meaning of the statute in the Proposed Decision mean that CalPERS has failed to adequately support its proposed order, and, upon review, the Proposed Decision would not sufficiently apprise a reviewing court of the basis for its action.

In addition, the Proposed Decision contains several misleading statements regarding the potential cost to CalPERS of granting eligibility for 20-year retirees. The CalPERS executive who testified at the hearing clarified that CalPERS would not incur any cost if 20-year retirees were eligible under PEMHCA, which is not clear from the Proposed Decision's statement that "CalPERS would not incur any significant cost." (See Proposed Decision, *Factual Findings*, ¶31(a), pp. 8-9.) Further, while CalPERS would not deduct all 20-year retirees' premium costs from their CalPERS retirement checks, the evidence shows that CalPERS already has billing procedures in place for collecting premiums from PEMHCA enrollees who are receiving a retirement check from an alternative retirement system. The Proposed Decision inaccurately states that "CalPERS would be unable to collect the contribution toward the premium from the 20-year retirees because they do not receive a retirement check directly from CalPERS or CalSTRS." (See Proposed Decision, *Factual Findings*, ¶31(a), pp. 8-9.) As shown at the hearing, the entire premium and administrative cost would be collected from the District.

Finally, an email exchange referred to in the Proposed Decision was contained in a proposed exhibit that was withdrawn at hearing and was not in evidence. (See Proposed Decision, *Factual Findings*, ¶22, at p. 7.) The statement of the factual basis for the Proposed Decision must be based exclusively on evidence in the record and matters officially noticed. (See Gov. Code §11425.50(c).) Accordingly, it was an error to cite or rely on any statements purported to be made in the email exchange.

For all of the above reasons, the District respectfully requests that the Board reject the Proposed Decision and grant the District's appeal.

Dated: November 5, 2015

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November 5, 2015

VIA OVERNIGHT DELIVERY

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Re: In the Matter of the Appeal of the Denial of Coverage Under the Public Employees' Medical and Hospital Act by FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT, Respondent.
Case No. 2013-0549 - OAH NO. 2013070971

Dear Ms. Swedensky:

Enclosed please find Respondent's Argument in the above-referenced matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Elizabeth Masson".

Elizabeth Masson

EJM:jl

Enclosure