



OFFICE OF THE CITY ATTORNEY
CITY OF SAN BERNARDINO

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June 5, 2013

KAREN DEFRANK, Division Chief
Customer Account Services Division
P.O. Box 942709
Sacramento, CA 94229-2709

Re: Appeal of Decision re: Richard Lewis



Dear Ms. DeFrank:

Please allow this letter to serve as the City of San Bernardino's objection to, and appeal of, the May 8, 2013 decision regarding retired Fire Captain Richard J. Lewis, II. Below is a summary of the applicable facts and law that pertain to this appeal:

STATEMENT OF FACTS

On or about March 6 2007, the City of San Bernardino entered into a settlement agreement with employee Richard J. Lewis, II, which was fully executed on or about March 23, 2007. As part of the settlement agreement, Captain Lewis was to receive the pay of a battalion chief as though he were promoted to that position even though he remained a captain. The City corresponded with CalPERS to determine how this pay should be reported. On July 5, 2007, CalPERS unequivocally instructed the City to report the extra pay as "special compensation" pursuant to *Government Code* section 20636 so that it could be counted for retirement purposes. CalPERS went further and instructed the City to report this compensation retroactive back to October 2, 2004. The City followed the instructions of CalPERS and has paid contributions at the battalion chief level.

In December 2007, nearly six months after CalPERS indicated the additional income to be reported was acceptable as "special compensation," the *Prentice v. Bd. of Administration (CalPERS)* (2007) 157 Cal.App.4th 983 case was published. The *Prentice* case stands for the proposition that a city manager's approximate 10% increase in salary did not constitute special compensation because the increase was not reflected in the published salary range and it was not available to other managers.

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On May 8, 2013, CalPERS began second-guessing its 2007 decision to allow the additional compensation for Captain Lewis' retirement. The May 8, 2013 letter from CalPERS relies on *Government Code* section 20160 and argues that despite CalPERS' accord regarding the pay received by Captain Lewis, it was now taking the position that the agreed upon designated special compensation would no longer be considered as such and would be excluded from his retirement pay.

LEGAL ARGUMENT

1. CalPERS Instructed the City to Report the Income as "Special Compensation," Thus There Was No Error.

Government Code section 20160(b) allows the board to correct errors or omissions by other agencies or "this system" (presumably meaning CalPERS), subject to certain provisions, namely, subsections (c) and (d). Subsection (c) of 20160 does not apply to the present facts, but because CalPERS seeks correction of a purported error, it has the burden of presenting documentation and other evidence establishing a right to correction subject to the provisions of subsections (a) and (b). *Gov. Code* § 20160(d).

While *Government Code* section 20160's language is somewhat circular, CalPERS must demonstrate: (1) the request to correct an error or omission is made within a reasonable time after discovery of the right to make the correction, not to exceed six months; (2) the error or omission was made due to mistake, inadvertence, surprise, or excusable neglect as defined in *Code of Civil Procedure* section 473; and (3) the correction will not provide CalPERS with a status, right or obligation not otherwise available. *Gov. Code* § 20160(a).

A. *The request to correct the error is untimely.*

CalPERS instructed the City to report the income as special compensation in July of 2007. It had all the same information available to it at that time as it does today. Thus, the decision by CalPERS to allow the increased pay to be reported as special compensation was intentional, with full knowledge of its effect, and cannot be argued as an error.

The first prong of the analysis cannot be met because CalPERS had all facts available to it to determine there was an error, if indeed it maintains there was an error, in July of 2007, or at the latest, December 7, 2007 when the *Prentice* case was published. Thus, should it still argue there was an error, it had from January up to May 2008 to attempt to correct the error.

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In fact, CalPERS never raised the issue until May 2013, almost six years past the statutory deadline.

B. The error or omission did not result from mistake, inadvertence, surprise, or excusable neglect.

Again, CalPERS cannot rely on the relief afforded by CCP 473's mistake, inadvertence, surprise or excusable neglect because all actions taken were knowingly authorized, were not a mistake, any surprise was never acted upon, and while there may be neglect, it is not of the excusable variety.

"Mistake" is extrinsic, so that a judgment based thereon may be set aside on principles of equity. *In re Whelan's Estate* (1969) 1 Cal.App.3d 517. "Inadvertence" means lack of heedfulness or attentiveness, inattention or fault from negligence. *Alderman v. Jacobs* (1954) 128 Cal.App.2d 273. "Surprise" is some condition in which a party finds himself unexpectedly placed to his injury. Without any fault or negligence of his own and against which ordinary prudence could not have guarded. *Porter v. Anderson* (1911) 14 Cal.App.716. "Excusable neglect" means that neglect which might have been the act of a reasonably prudent person under the same circumstances. *Alderman, supra*, 128 Cal.App.2d 273.

The only occasion for application of provisions of CCP 473 authorizing the vacation of a judgment entered through mistake, inadvertence, surprise or excusable neglect is where the party is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary prudence could not have guarded. *Elms v. Elms* (1946) 72 Cal.App.2d 508. To authorize vacation of judgment, facts shown by applicant must constitute mistake, inadvertence, surprise or excusable neglect as a matter of law, and erroneous reliance on reasons which would merely constitute everyday excuse for suffering judgment will not suffice. *Salazar v. Steelman* (1937) 22 Cal.App.2d 402.

In the present case, in 2007 CalPERS was provided all pertinent information and data to make a determination on what to do with the increased pay. CalPERS took that data and then instructed the City to report the increased pay as special compensation so that it could be recovered during Captain Lewis' retirement. CalPERS cannot now argue that it was suddenly put into a situation to its detriment without fault or negligence of its own. Sudden realization cannot reasonably occur six years after the decision is made. In 2007, CalPERS made a decision fully apprised of all facts.

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At best, CalPERS could have argued the December 2007 *Prentice* case created surprise, but that argument needed to be made in 2008 soon after the case was published. Again, because six years has passed, it can no longer rely on mistake, inadvertence, surprise or excusable neglect because it is culpable in not using due diligence to correct any newly perceived error in the instructions for reportable compensation.

2. *Assuming Arguendo Government Code § 20160 Does Not Apply, The Statute of Limitations Is Three Years.*

Assuming arguendo the six month provision of *Government Code* section 20160 does not apply, the applicable statute of limitations would be the three year provision found in *Code of Civil Procedure* section 338(a) [action based on statute]. The cause of action accrued either on July 5, 2007, the date CalPERS sent the purportedly mistaken letter, or December 7, 2007, the date *Prentice* was published and a reasonably prudent person would have determined that a potential mistake in calculation occurred. Ignoring the provisions of *Government Code* section 20160 for the moment, CalPERS would have had three years from December 7, 2007 within which to attempt to correct its July 5, 2007 action. The last day to attempt to cure the actions from July 2007 was December 7, 2010.

In the present case, CalPERS may attempt to argue the cause of action did not arise for statute of limitations analysis until Captain Lewis retired and it realized the amount of money it was obligated to pay, however, this argument would be disingenuous. The actions of CalPERS were documented in July 2007, evidencing knowledge of the consequences of the instructions as well as complicity and acquiescence.

3. *Estoppel Precludes CalPERS from Excluding the Increased Special Compensation.*

Equitable estoppel is a doctrine that precludes a party from benefitting from conduct that misleads another to the latter's prejudice. *Kleinecke v. Montecito Water Dist.* (1983) 147 Cal.App.3d 240. A party may not deny the existence of a state of facts if that party intentionally led another party to believe the facts to be true and to rely on that belief to the party's detriment. *City of Goleta v. Superior Court* (2006) 40 Cal.4th 270.

In the present case, on July 5, 2007 CalPERS informed the City and Captain Lewis that the increased salary would be considered "special compensation" for purposes of retirement calculation. The City paid contributions to CalPERS based on its instructions and the employee relied on CalPERS' statements that the money would be paid as promised, and did not test for the

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battalion chief position again. Both the City and Captain Lewis relied on CalPERS' instructions to their detriment and CalPERS is estopped from reversing its decision six years after it was issued.

4. The *Prentice* Case Occurred After this Matter, Is Inapposite, and Should Not Be Applied Retroactively.

In *Prentice v. Bd. of Administration (CalPERS)* (2007) 157 Cal.App.4th 983, a city manager was provided an approximate 10% increase in salary which was not consistent with the published rates for the position. The court decided the increased pay did not constitute special compensation because the increase was not reflected in the published salary range and it was not available to other managers.

This case was published on December 7, 2007, almost six months after CalPERS sent its letter instructing the City to report the increased pay as special compensation. Thus, it was not the law of the land at the time CalPERS instructed the City to report the increased pay. It can be distinguished because the pay schedule for Captain Lewis is actually published and is available to all individuals holding the position of battalion chief pursuant to the City's salary resolution, the labor agreement with the Fire union, and the settlement agreement with Captain Lewis. Additionally, CalPERS permitted the City to report the special compensation unlike in *Prentice* where it prohibited the salary increase.

Furthermore, the *Prentice* case should not be applied retroactively because of the estoppel argument listed above.

Very truly yours,

JAMES E. PENMAN, City Attorney



Richard D. Luczak
Deputy City Attorney

encls.: Settlement Agreement
July 5, 2007 CalPERS Letter