

**ATTACHMENT C**  
**RESPONDENTS' ARGUMENT**

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December 3, 2015

**VIA FAX**

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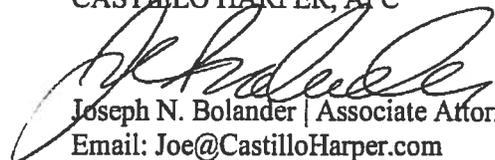
***RE: In the Matter of the Calculation of Final Compensation of Darryl Hurt and  
Timothy Bacon, Respondents, and City of Riverside, Respondent.  
Case Numbers: 2012-0190 & 2012-0191  
OAH Numbers: 2014090777 & 2014090781***

Dear Ms. Swedensky,

Enclosed please find Respondents' Argument on behalf of Timothy Bacon and Darryl Hurt.  
Should you have any questions or concerns, please do not hesitate to contact our office. Thank  
you for your attention to this matter.

Sincerely,

CASTILLO HARPER, APC



Joseph N. Bolander | Associate Attorney  
Email: Joe@CastilloHarper.com

**Received**

**DEC 3 2015**

**CalPERS Board Unit**

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8 Attorneys for Respondents  
 9 **TIMOTHY BACON and DARRYL HURT**

10 **BEFORE THE BOARD OF ADMINISTRATION**  
 11 **CALIFORNIA PUBLIC EMPLOYEEST RETIREMENT SYSTEM**  
 12 **STATE OF CALIFORNIA**

13 In the Matter of the Appeal of Final  
 14 Compensation:  
 15 **DARRYL HURT,**  
 16 **AND**  
 17 **CITY OF RIVERSIDE**  
 18 Respondents.

19 Agency Case No. 2012 0190  
 20 OAH No. 2014090777

21 In the Matter of the Appeal of Final  
 22 Compensation:  
 23 **TIMOTHY BACON,**  
 24 **AND**  
 25 **CITY OF RIVERSIDE**  
 26 Respondents.

27 Agency Case Nos. 2012 0191  
 28 OAH No. 2014090781  
**RESPONDENT’S ARGUMENT**

**I. INTRODUCTION**

It was undisputed at hearing that Respondents Darryl Hurt and Tim Bacon (“Respondents”) were denied promotions to the position of Police Captain in substantial part based on their First Amendment speech and union activities. As part of a settlement with the City of Riverside, Respondents effectively received the promotions they had been unlawfully

1 denied. The evidence further showed that Respondents' commensurate pay increases were  
2 consistent with publically available pay schedules for the position of Captain at the City of  
3 Riverside, and Respondents worked as Captains while on paid administrative leave for a  
4 substantial amount of time before they retired. They would have been Captains sooner and  
5 during the normal course of events but for unlawful retaliation. The Administrative Law Judge  
6 agreed with Respondents that there is no reason in law or otherwise that these remedial "payrate"  
7 corrections should be excluded from the calculation of their final compensation.

8 Moreover, the Administrative Law Judge rightly found that the California Public  
9 Employees' Retirement System ("CalPERS") is estopped from claiming that Respondents are not  
10 entitled to Captain's retirements. CalPERS was asked whether Respondents' retirement benefits  
11 would be calculated at the Captains' pay level *before* the settlement agreement that led the  
12 parties to this point was finalized. State Senator Richard Roth credibly testified that a CalPERS  
13 analyst represented to him, as the City's then counsel, that under the circumstances Respondents  
14 would receive a Captain's retirement. And naturally and reasonably, Respondents relied on  
15 those representations in deciding to retire when they did, and in planning what their retirement  
16 income would be.

17 Respondents now respectfully ask the Board of Administration ("Board") to adopt the  
18 Proposed Decision of the Administrative Law Judge in its entirety.

## 19 II. ISSUES PRESENTED

20 Whether compensation in the form of a "special salary adjustment" pursuant to a  
21 settlement agreement between Respondents Hurt and Bacon and Respondent City can be  
22 included in the calculation of Respondent's Hurt and Bacon's final compensation.

## 23 III. THE PROPOSED DECISION

24 On October 22, 2015, the Hon. Mary Agnes Matyszewskj, Administrative Law Judge,  
25 after hearing evidence from both Respondents and CalPERS, granted Respondents' appeals,  
26 ordering that "[CalPERS] shall include the 'Special Salary Adjustment', reached pursuant to the  
27 settlement agreement, in [Respondents'] final compensation calculation." [Timothy Bacon  
28 Proposed Decision ("Bacon Dec."), 20; Darryl Hurt Proposed Decision ("Hurt Dec."), 19.].

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#### IV. ARGUMENT IN FAVOR OF PROPOSED DECISION

The sound recommendation of the ALJ should be adopted as the decision of the Board because (1) the salary correction at issue qualifies as “compensation earnable” under Government Code § 20636, and it does not constitute “final settlement pay”; and (2) because the principle of equitable estoppel operates to prevent CalPERS from now asserting that the salary adjustments were *non*-pensionable, as Respondents reasonably relied on CalPERS’ assurances to the contrary.

**A. The Top-Step Captains Back-Pay and Continuing Compensation at the Top-Stop Captain Rate Qualifies as Pay Rate under Government Code § 20636(b)(1).**

Government Code section 20636, subdivision (b)(1), in relevant part defines “payrate” as “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...”

Here, Respondents were undisputedly paid according to the publicly available pay rate established for similarly situated members of their class—*police Captains*. As the ALJ pointed out, “The settlement agreement...gave [Respondents] a captain’s salary, a salary identified on the publicly available payrate; it placed [them] in the group of class of captains, and [they were] paid the average monthly compensation paid to the class of captains for services while on a leave of absence.” [Bacon Dec., 18; Hurt Dec., 17.]

Here, unlike in *Prentice*, 157 Cal.App.4<sup>th</sup> at 992, the settlement agreement and pay records in this case make it clear that both Hurt and Bacon were promoted to captain and were compensated like all other Captains. (Exhibit 7; Exhibit 8). They were not a part of some other class comprised only of themselves. Merely because some documents suggest that Respondents remained lieutenants in name and name only, this does not change the nature of the agreement between Respondents and the City, nor the substantive reality that they acted as and were paid as Captains. The ALJ’s findings of fact on this issue were sound and there is not sufficient evidence to disturb them.

CalPERS argument that neither Hurt nor Bacon were promoted via the City’s merit based process is also misplaced. CalPERS Retirement Program Specialist, Samuel Camacho testified

1 at the hearing that there is no Government Code requirement as to how an agency is required to  
2 grant promotions. (RT Hearing 147:12-16). Moreover, CalPERS does not “get into telling the  
3 agency how to promote their employee...” (RT Hearing 148:14-16). Respondents alleged, the  
4 City tacitly acknowledged and the ALJ found, that but for that unlawful conduct, Respondents  
5 would have promoted in the normal course. Their subsequent elevation to the Captain’s payrate  
6 should therefore be treated no differently than the correction of a payroll error. All necessary  
7 contributions were made to the retirement system to ensure a Captains retirement, and  
8 Respondents were paid as Captains and worked as such while on leave. Respondents will  
9 therefore receive no greater benefit than they would have received earlier, absent the delay  
10 caused by unlawful retaliation. (RT Hearing 18:14-17; RT Hearing 71:14-19).

11 Thus, CalPERS should be bound by the City’s determination of an employee’s  
12 classification even if the employee earned that classification outside of the City’s typical process.  
13 Especially in a situation like the case at hand, where employees are passed over for promotion  
14 because of their involvement in protected activities. Those employees should not be further  
15 denied the benefits of that promotion merely because they had to go to federal court to obtain it.

16 **1. The Salary Adjustment is Not Final Settlement Pay.**

17 Government Code section 20636, subdivision (f), defines final settlement pay as “pay or  
18 cash conversions of employee benefits that are in excess of compensation earnable, that are  
19 granted or awarded to a member in connection with, or in anticipation of, a separation from  
20 employment.” California Code of Regulations, Title 2, Section 570, provides:

21 “Final settlement pay” means any pay or cash conversion of employee  
22 benefits in excess of compensation earnable, that are granted or awarded to a  
23 member in connection with or in anticipation of a separation from employment.  
24 final settlement pay is excluded from payroll reporting to PERS, in either payrate  
25 or compensation earnable. ¶ For example, final settlement pay may consist of  
26 severance pay or so-called “golden parachutes”. [sic] It may be based on accruals  
27 over a period of prior service. It is generally, but not always, paid during the  
28 period of final compensation. It may be paid either lump-sum, or periodic  
payments. ¶ Final settlement pay may take the form of any item of special  
compensation not listed in section 571. It may also take the form of a bonus,  
retroactive adjustment to payrate, conversion of special compensation to payrate,  
or any other method of payroll reported to PERS.

1 In this case, the ALJ rightly found that the salary corrections did not “exceed  
2 compensation” earnable. Respondents’ salaries were in line with the pay rate of similarly  
3 situated members of the same class, Captains. Additionally, the context in which the  
4 adjustments were made—as a remedy for unlawful promotion denials—demonstrate them to be  
5 unconnected to Respondents’ retirements. As the ALJ noted,

6 The entire basis of [Respondents’] litigation was that [they] had been wrongfully  
7 passed over for promotion. The city acknowledged that error when it settled with  
8 [them] and paid [them] back pay and benefits at the captain rate and future  
9 benefits at the captain rate, including retirement. Moreover, [Respondents were]  
10 not immediately retired; [they were] placed on administrative leave. Had the  
11 settlement agreement only been for the \$250,000 in exchange for the termination  
of employment, it may well have constituted final settlement pay and been  
disqualified from compensation earnable calculations. However, that was not how  
this settlement was structured....

12 [Bacon Dec., 18; Hurt Dec., 17.]

13 It is also significant that the effective date for the payrate increases coincides with the  
14 date that Respondents would have been promoted absent unlawful retaliation. And as the ALJ  
15 notes, Respondents do not seek the inclusion of any arbitrary lump sum settlement payment. The  
16 payments that should be included are those flowing directly from Respondents proper re-  
17 classification as Captains. (Compare *Molina v. Board of Administration* (2011) 200 Cal.App.4th  
18 53 at p. 66 (“*Molina*”). In this case, Respondents’ “back pay was calculated using publicly  
19 available captain payrates, and [their] future pay was to be based on the publicly available  
20 captain payrate and benefits.” [Bacon Dec., 19; Hurt Dec., 18.] Further untethering Respondent’s  
21 payroll correction from their retirements, unlike the pensioner in *Molina*, Respondents continued  
22 to be employed after resolving the case.

23 Thus, because Respondents’ salary corrections qualified as payrate under the  
24 Government Code and were not final settlement pay, they should be included in their pension  
25 calculation.

26 **B. The ALJ Correctly Determined that all of the Elements of Equitable Estoppel are  
27 met on these Facts.**

28 Equitable estoppel applies where: (1) the party to be estopped is apprised of the facts; (2)  
the party to be estopped intends his/her conduct to induce reliance, or acts in a way that the party

1 asserting the estoppel has a right to believe reliance is intended; (3) the party asserting estoppel is  
 2 ignorant of the true state of facts; and (4) the party asserting estoppel relies upon the conduct to  
 3 his injury. (*City of Long Beach, supra*, 3 Cal.3d at 496-97.) Based on the testimony of Senator  
 4 Roth, Respondents, and CalPERS Analyst Camacho, the ALJ rightly found these elements to be  
 5 met. [Bacon Dec., 17; Hurt Dec., 16.]

6 Further, there is a second prong to the estoppel test when the doctrine is asserted against a  
 7 public entity that Respondents have met. Specifically, a party asserting estoppel against the  
 8 government must additionally show that the injustice that may result from not granting the  
 9 estoppel claim is “of sufficient dimension to justify any effect upon public interest or policy  
 10 which would result from the raising of an estoppel.” (*Ibid.*)

11 Here, there is a strong public interest in ensuring that cities do not retaliate against  
 12 employees for engaging in constitutionally protected activities. The public also has a strong  
 13 interest in ensuring that members can rely on material representations from CalPERS. And there  
 14 is also no countervailing harm to the public interest if CalPERS is estopped in this case. This is  
 15 largely because CalPERS has the statutory authority, and obligation, to do exactly what it is  
 16 asked to do—include in Respondents’ final compensation calculations payments made pursuant  
 17 to the publicly available pay schedule for similarly situated employees of the same class.

(Compare *Medina*, 200 Cal.App.4th at p. 870.)

18 **C. Respondents Take No Position on whether the Decision of the Board should be**  
 19 **Designated as a Precedential Decision**

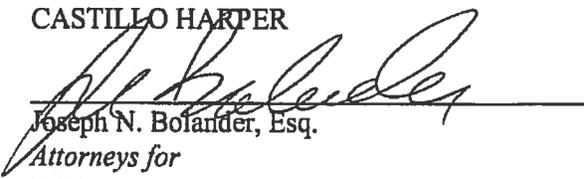
## 20 V. CONCLUSION

21 Based on the foregoing, Respondents respectfully request that the Board adopt the  
 22 proposed decision of the Administrative Law Judge in its entirety.

23 Dated: December 3, 2015

Respectfully submitted,

24 CASTILLO HARPER

25   
 26 Joseph N. Bolander, Esq.

27 Attorneys for  
 28 TIMOTHY BACON and DARRYL HURT

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**PROOF OF SERVICE**

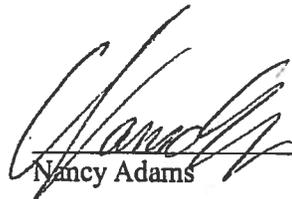
I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 3333 Concourse St., Bldg. 4, Ste. 4100, Ontario, CA 91764.

On December 3, 2015, I served the following document described as **RESPONDENTS' ARGUMENT** on the interested parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope addressed as follows:

Cheree Swedensky, Assistant to the Board  
CaIPERS Executive Office  
Fax: (916) 795-3972  
**VIA FAX ONLY**

- I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Ontario, California.
- By Personal Service, I caused such envelope to be delivered by hand to the above addressee(s).
- By facsimile machine, I caused the above-referenced document(s) to be transmitted to the above-named persons(s)
- By Overnight Courier, I caused the above referenced document(s) to be delivered to an overnight courier (UPS) for delivery to the above addressee(s).
- BY ELECTRONIC MAIL (E-MAIL) I served the foregoing document by electronic mail (e-mail):
- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 3, 2015, at Ontario, California.

  
Nancy Adams