

ATTACHMENT A
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO DECLINE TO ADOPT THE PROPOSED DECISIONS

At its December 16, 2015, meeting, the CalPERS Board of Administration (Board) declined to adopt the Proposed Decisions in this matter and granted a full Board Hearing in connection with the appeals of Respondents Timothy Bacon and Darryl Hurt (Respondents Bacon and Hurt).

CalPERS staff requests that the Board deny Respondents Bacon and Hurt's appeals of staff's determination that certain settlement payments are to be excluded from the calculation of Respondents Bacon and Hurt's pension benefits.

I. SUMMARY OF CASE

On April 12, 2010, Respondents Bacon and Hurt settled a lawsuit filed against the City of Riverside (City). Pursuant to the settlement, the City agreed to pay "lieutenants" Respondents Bacon and Hurt additional compensation per the Captain pay scale and ensure they received "at least 12 months of compensation at the top-step Captain rate prior to their retirement." (Respondent's Exh. 7, p. 2:15-21.) In return, Respondents Bacon and Hurt agreed to immediately go on administrative leave and retire at the end of that leave. (Respondent's Exh. 7, p. 3:7-11.) The City reported the additional compensation to CalPERS as a "special salary adjustment pursuant to a settlement." (CalPERS Exhs. 16 & 17.)

On September 14, 2011, after reviewing pertinent documents, CalPERS staff issued a formal determination to the City and Respondents Bacon and Hurt, stating the salary increase at the top-step level of a captain, in the amount of \$1,821.04 per month, would be excluded in the calculation of Respondents Bacon and Hurt's final compensation. (CalPERS Exhs. 3 & 4.) The determination letters explained that additional compensation reported on behalf of Respondents Bacon and Hurt failed to comply with the Public Employees' Retirement Law (PERL). Specifically, the additional compensation did not qualify as "payrate" under Government Code section 20636 and constituted "final settlement pay" under Title 2, California Code of Regulations, section 570. The letters informed Respondents Bacon and Hurt and the City of their appeal rights. Respondents Bacon and Hurt timely appealed.

On September 19, 2014, CalPERS issued a Statement of Issues (SOI) for each Respondent. (CalPERS Exh. 1 & 2.) The sole issue presented by the SOIs was whether the "special salary adjustment" paid to Respondents Bacon and Hurt, pursuant to a Settlement between Respondents Bacon and Hurt and the City, can be included in the calculation of Respondents Bacon and Hurt's final compensation.

The hearing in this matter included testimony of Respondents Bacon and Hurt, CalPERS staff, and counsel for the City at the time of the settlement of the lawsuit filed against the City by Respondents Bacon and Hurt, Senator Richard Roth.

Proposed Decisions were issued on October 22, 2015, ordering CalPERS to include the settlement proceeds in Respondents Bacon and Hurt's final compensation as payrate. (Attach. D.)

At the Board meeting held on December 16, 2015, CalPERS staff argued for rejection of the Proposed Decisions. (Attach. D, Subpart B.) Among the reasons that staff recommended rejection of the Proposed Decisions was that the Administrative Law Judge (ALJ):

- I. Erroneously concluded the payments made by the City, in settlement of a failure to promote and employment discrimination lawsuit brought against it by Respondents Bacon and Hurt, qualified as payrate to be included in Respondents Bacon and Hurt's Final Compensation for purposes of calculating their respective retirement allowance. (Gov. Code section 20636(b).)
- II. Erroneously concluded the payments made by the City were not "final settlement pay." (Gov. Code section 20636(c)(7)(A); California Code of Regulations, title 2 section 570.)
- III. Improperly applied the doctrine of equitable estoppel.

On December 16, 2015, the Board declined to adopt the Proposed Decisions and set this matter for a full Board Hearing.

II. ISSUE PRESENTED

Shall the settlement payments at issue be considered "payrate" and be included in Respondents Bacon and Hurt's final compensation?

II. FACTUAL BACKGROUND

Respondents Bacon and Hurt were employed by the City as police lieutenants. Claiming they were wrongfully passed up for promotion to the position of police captain, Respondents Bacon and Hurt filed a lawsuit against the City in 2009. (Respondents' Exhs. 5, 6 & 7.) The litigation was resolved through a Settlement Agreement on April 12, 2010 (Settlement Agreement). (Respondents' Exh. 7.) The relevant terms of the Settlement Agreement are as follows:

- "Hurt will retire from the City of Riverside Police Department as a Police Lieutenant on January 19, 2011 and Bacon will retire as a Police Lieutenant on July 17, 2010, both 50 years of age." (Respondent's Exh. 7, p. 2:7-10.)
- The City would "pay to Bacon and Hurt additional compensation from January 25, 2008, to today's date per the Captain pay scale and during the administrative leave period . . ." "[T]he City will ensure that both received at least 12 months of

compensation at the top-step Captain rate prior to their retirement.” (Respondents’ Exh. 7, p. 2:15-21.)

- The City will place “[L]ieutenants Bacon and Hurt on paid administrative leave at a monthly salary equivalent to the top-step Captain’s monthly salary rate with full benefits commencing tomorrow and continuing to the respective dates of their retirement.” (Respondent’s Exh. 7, p. 3:7-11.)

The terms and conditions of the Settlement Agreement were to remain confidential, other than if disclosed to Respondents Bacon and Hurt’s prospective employers. (CalPERS Exh. 19, pp. 3-7; Transcript 23:18-20.) Respondents Bacon and Hurt were never promoted to the higher position of captain through the civil service rules, as prescribed by the City Charter and required by the Memorandum of Understanding (MOU). (CalPERS Closing Brief, pp. 52, 56; Transcript 52:1-2, 114:22-25; 115:1-14.) Receipt of the additional compensation was not conditional on Respondents Bacon and Hurt’s performance of any services, whether that of lieutenant or a higher position. There is no evidence that Respondents Bacon and Hurt ever performed the duties of a captain.

Pursuant to the Settlement Agreement, Respondent Bacon retired from the City Police Department as a lieutenant effective July 17, 2010. (CALPERS Exh. 20, p.2.) Respondent Hurt retired from the City Police Department as a lieutenant effective January 19, 2011. (CalPERS Exh. 20, p. 2.) In their respective Industrial Disability Retirement applications, Respondents Bacon and Hurt confirmed they were lieutenants. (CalPERS Exhs. 9 & 10.) Both retired claiming they were substantially incapacitated from performing the job duties of a lieutenant during the time period they were receiving captain’s pay. (CalPERS Exhs. 9, p. 10; 10, pp. 1-2.) These facts underscore CalPERS’ findings that no services were rendered by Respondents Bacon and Hurt in a captain’s capacity.

Documents provided by the City listed Respondents Bacon and Hurt as police lieutenants. (CalPERS Exhs.15, 16, & 17.) In response to an inquiry by CalPERS’ Compensation Review Unit regarding Respondent Bacon and Hurt’s job titles, the City confirmed they were both lieutenants. (CalPERS Exhs. 18, pp. 1-4; 16, p. 3.) The City stated Respondents Bacon and Hurt were never formally promoted a higher position than that of lieutenant. (CalPERS Exh. 16, p. 1.)

The City Charter, City Ordinance, and the applicable MOU set out the mandatory, step by step, promotional process for promoting a lieutenant to the rank of captain. The City’s rules for civil service require that all “appointments and promotions in the classified service shall be based on merit.” (CalPERS Closing Brief, p. 56.) The MOU sets out the merit-based promotional procedure for a captain. (CalPERS Closing Brief, p. 60.)

At the hearing, Respondent Hurt testified that for a lieutenant to become a captain, he or she must pass the chief board’s oral, chief’s one-on-one oral, be on the chief’s list of recommended candidates, and then be approved by the City Manager. (Transcript

47:20-25; 48; 50:14-15; 51:13-25, also see CalPERS Closing Brief, p. 60.) Respondent Hurt was the union president at the time this merit based promotional process was instituted. (Transcript 17:17-18; 18:6.) Respondents Bacon and Hurt tested for and were placed on the promotional list, but were never promoted to captain through the merit based promotional process. (Transcript 52:1-2, 114:22-25; 115:1-14.)

There is no evidence indicating CalPERS provided anything in writing to any party promising Respondents Bacon and Hurt would receive retirement benefits based on the top-step captain payrate. (CalPERS Exhs. 11 &12, Transcript 94:17-21; 95:15-25; 96:1-13.) Respondents Bacon and Hurt presented the testimony of Senator Roth, outside counsel who represented the City in the employment litigation. Senator Roth testified he was present during a phone call between the City's Human Resources' staff and someone he understood to be a CalPERS representative. (Transcript pp. 87:14-25; 88:1-12.) Senator Roth testified that the communication between the City and the CalPERS representative led Senator Roth to believe that CalPERS had "no objections to what [the City was] proposing in the federal district court settlement." (Transcript 88:17-23.) He, however, could not recall any details, such as the name of the City's Human Resources' staff, the date and time of the call, the name of the CalPERS' representative, the title of the representative, who spoke during the discussion, or what the representative stated. (Transcript 87:18-25; 88:1-23; 89:16-17.) In contrast, CalPERS presented the Customer Touch Point Reports, which contained no record indicating such a discussion ever took place. (CalPERS Exhs. 11 &12, Transcript 94:17-21; 95:15-25; 96:1-13.)

The ALJ admitted that, "[a]t first blush," the Settlement Agreement payments appeared to fall within the definition of "final settlement pay," thereby precluding it from inclusion in final compensation calculations. However, she then found that because the Settlement Agreement resulted from a "failure to promote" lawsuit, it somehow manages to satisfy the requirements of Government Code Section 20636:

The Settlement Agreement satisfied the requirements of Government Code section 20636 because it gave Mr. Bacon a captain's salary, a salary identified on the publicly available payrate; it placed him in the group of [sic] class of captains, and he was paid the average monthly compensation paid to the class of captains for services while on a leave of absence.

The ALJ cited no legal authority for the exception she carved out. She appeared solely motivated to protect the ability of CalPERS members to sue their employers for "failure to promote." As a result, the ALJ refused to apply the express provisions of the PERL. The Proposed Decisions presume, without any analysis, and without even citing the pertinent sections of law, that the settlement payments qualify as "payrate." The Proposed Decisions erroneously conclude that because the additional compensation Respondents Bacon and Hurt received was based on the pay scale of a captain, the salary schedule for a captain constituted their "publicly available pay schedule," despite the fact that Respondents Bacon and Hurt were never actually promoted to that position

and were not required to perform any services for the City after the date of the Settlement Agreement.

IV. ARGUMENT

A. The Settlement Payments Do Not Qualify As Payrate Under The PERL.

Final compensation is defined, in this case, as the highest average consecutive twelve months of "compensation earnable." (Gov. Code section 20042.) Compensation earnable is the compensation paid by the employer as "payrate" and "special compensation." (Gov. Code section 20636(a).) Payrate is defined under the PERL to be the 1) 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, 2) for services rendered during normal working hours, and 3) pursuant to a publicly available pay schedule. (Gov. Code section 20636(b)(1).) The salary increase provided pursuant to the Settlement Agreement does not qualify as compensation earnable because it is final settlement pay and fails to meet the three prongs of payrate under Gov. Code section 20636(b).

1. The Additional Compensation Was Not Available To Similarly Situated Employees.

To qualify as payrate, the member's rate of pay must be that which is paid to similarly situated members of the same group or class of employment. (Gov. Code section 20636, subd. (b); *Prentice v. Board of Administration*, (2007), 157 Cal.App.4th 983, 990.) Thus, it must first be determined to which class or group of employment Respondents Bacon and Hurt belonged. (Gov. Code section 20636, subd. (b)(1), (2), (e) (2).)

According to relevant case law, the City Charter, City Ordinance, the MOU, and the documents submitted to CalPERS, Respondents Bacon and Hurt should be classified as lieutenants because they were never promoted. Rather than relying on a member's self-serving statements, the *Prentice* court looked at the correspondence between the City and CalPERS in determining a member's class. (*Prentice*, 157 Cal.App.4th 983, 992-993.) Here, all correspondence from the City and Respondents Bacon and Hurt to CalPERS stated Respondents Bacon and Hurt were lieutenants. (CalPERS Exhs. 9, 10, 15, 16, 17, and 18.)

The Proposed Decisions assume that because the Settlement Agreement provides Respondents Bacon and Hurt additional compensation that matches the salary of a captain, they were promoted to captains. This assumption, however, is contrary to the holding in *Snow v. Bd. of Admin.* (1978) 87 Cal.App.3d 484, 486-87. The member in *Snow*, an Assistant Land Agent, claimed he was performing the duties of a higher classification. (*Id.*) *Snow* received an award from the Board of Control for the difference in salary between an Assistant Land Agent and the higher classification of Associate Land Agent. (*Id.*) *Snow* argued the award should be included in calculating his pension

benefits. (*Id.*) The Court disagreed and held the member must be promoted into the higher position under the civil service rules in order to receive a pension based on the higher classification. (*Id.* at 486.) Here, Respondents Bacon and Hurt were not promoted pursuant to the merit-based process prescribed in the City Ordinance and the MOU applicable to all other lieutenants. Thus, in accordance with *Snow*, they must be classified as lieutenants and their pension must be based on the same payrate as other lieutenants.

2. The Additional Compensation Was Not For Services Rendered.

Second, to qualify as payrate, the rate of pay must be for services rendered during normal working hours. (Gov. Code section 20636(b)(1).) The additional compensation, provided pursuant to the Settlement Agreement does not meet this requirement because it was paid not for past or future services but to resolve a legal dispute between the parties. Although the Settlement Agreement provides additional compensation to match the payrate of a captain, there is no evidence demonstrating Respondents Bacon and Hurt ever performed the duties of a captain. Nor were they expected to. They were placed on administrative leave on the effective date of the Settlement Agreement and were never to return to work. (Respondents' Exh. 7, p. 3:7-11.) Receipt of the additional compensation was not contingent on the performance of any services.

Even if Respondents Bacon and Hurt performed the duties of captain, they are not entitled pension at the payrate of a captain pursuant to *Snow* because they were never promoted to the higher position. *Snow* held that "mere assumption and performance of the duties of a higher classification cannot require that the employee be appointed to it." (*Snow*, 87 Cal. App. 3d 484,489, affirmed by *Ligon v. State Personnel Bd.* (1981) 123 Cal. App. 3d 583, 589-590.) The additional compensation cannot qualify as payrate or compensation earnable as Respondents Bacon and Hurt were entitled to the position of lieutenants and not that of captains. (See *Snow*, 87 Cal.App.3d 484,489, "Snow was entitled to the position of Assistant Land Agent and not that of Associate Land Agent.") Thus, Respondents Bacon and Hurt fail to meet the second prong of Government Code section 20636(b).

3. The Additional Compensation Was NOT Pursuant To A Publicly Available Pay Schedule.

Third, to qualify as payrate, the rate of pay must be pursuant to a publicly available pay schedule. (Gov. Code section 20636(b)(1).) The Board has defined in regulation what may be considered a publicly available pay schedule. (Cal. Code Regs., Title 2, section 570.5; see also, CalPERS Precedential Decision *In re Randy Adams*, OAH case No. 10122030095.) Individual settlement agreements do not constitute publicly available pay schedules. (*Molina v. Board of Admin.* (2011) 200 Cal.App.4th 61, 66-67; *In re Randy Adams*, CalPERS Precedential Decision OAH 012030095.) What qualifies as payrate is not a subject of agreement by or between the employer and employee. (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 201.)

The Settlement Agreement does not conform to any of the criteria necessary for it to be considered a publicly available pay schedule pursuant to California Code of Regulations 570.5 or as discussed in *Adams*. The Proposed Decisions assume that because the private Settlement Agreement compensates Respondents Bacon and Hurt “as if” they had been promoted to the position of captains, and because the City has a “publicly available pay schedule” for the position of captain, then the settlement payments were paid pursuant to the “publicly available pay schedule” of a captain. Respondents Bacon and Hurt, however, were provided additional compensation pursuant to the Settlement Agreement, not pursuant to the merit-based process set out in the MOU. There is no evidence indicating the Settlement Agreement was, or even could, qualify as a publicly available pay schedule. To the contrary, the terms and conditions of the settlement were to remain confidential.

B. The Additional Compensation Is Final Settlement Pay.

The ALJ had it right at first blush. Settlement payments cannot be considered final compensation; contrary to the ALJ's holding, the PERL does not provide any exceptions to this rule.

Final settlement pay is statutorily defined as “pay or cash conversions of employee benefits that are in excess of compensation earnable, that are granted or awarded to a member in connection with, or in anticipation of, a separation from employment.” (Gov. Code section 20636, subd. (f).) California Code of Regulations, title 2, section 570 provides that “[f]inal settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.” Final settlement pay may take the form of a “retroactive adjustment to payrate, conversion of special compensation to payrate, or any other method of payroll reported to PERS.” (*Id.*)

Here, the payments were calculated and adjusted in contemplation of Respondents Bacon and Hurt's separation from employment. (CalPERS Exhs. 15, 16, 17.) Respondents Bacon and Hurt both testified that they retired in exchange for receiving the settlement pay. (Transcript 43:14-19, 116:19-25, 117:1-13.) Thus, as a matter of law, CalPERS is required to exclude the settlement pay from final compensation.

The Proposed Decisions fail to appropriately apply the PERL and relevant case law. The Board should reject the erroneous analysis and conclusion in the Proposed Decisions and conclude the additional compensation under the Settlement Agreement is final settlement pay and does not constitute a payrate as defined under the PERL.

C. Respondents Bacon and Hurt Cannot Rely On Equitable Estoppel.

Respondents Bacon and Hurt contend the additional compensation should be included in their final compensation because their attorney was informed by Senator Roth, immediately prior to entering the Settlement Agreement, that the Settlement Agreement

was acceptable to CalPERS. (Transcript pp. 25:2-25, 88:17-23; 80:10-25, 81:1-6.) Respondents Bacon and Hurt, however, are not entitled to relief under this doctrine.

A party asserting the doctrine of equitable estoppel must establish: (1) the party to be estopped was apprised of the facts; (2) the party to be estopped intended or reasonably believed that claimant would act in reliance on its conduct; (3) the claimant was ignorant of the true state of facts; and (4) the claimant actually and reasonably relied on the conduct of the party to be estopped to his detriment. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.) In addition, where estoppel is sought to be asserted against a governmental entity, a fifth element must be established - 5) the interests of a private party must outweigh the effect on public interests and policies. (*Id.* at 496-97.) It is the burden of the party asserting estoppel to affirmatively establish each of its elements. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051.)

In this case, CalPERS did not issue anything in writing, to any party, stating Respondents Bacon and Hurt would receive retirement benefits based on the captain's pay scale. (CalPERS Exhs. 11 & 12, Transcript 94:17-21; 95:15-25; 96:1-13.) Although at the time of the Settlement Agreement, all Respondents were represented by attorneys to advise them of their legal rights, they now claim someone at CalPERS misled them into believing the settlement proceeds would qualify as final compensation. Other than Senator Roth's vague testimony, Respondents Bacon and Hurt fail to present any evidence demonstrating CalPERS ever made such a promise. CalPERS presented the my|Calpers Customer Touch Point Reports, which show no record of such an inquiry or discussion. (CalPERS Exhs. 11 & 12.) Furthermore, when Respondent Bacon contacted CalPERS on June 3, 2010, less than two months after the settlement, to verify his final compensation for retirement, he was informed the calculation was not complete. (CalPERS Exhs. 12, p.7.)

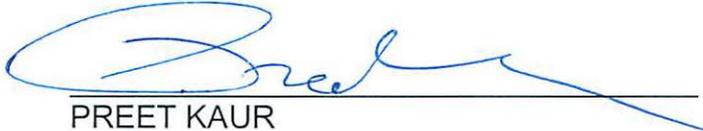
Contrary to the Proposed Decisions, estoppel is unavailable here as a matter of law. Estoppel cannot provide Respondents Bacon and Hurt a benefit otherwise unavailable under the express provisions of the PERL. (*Chaidez v. Board of Administration of California Public Employees' Retirement System* (2014) 223 Cal.App.4th 1425, 1432, review denied (May 14, 2014).) CalPERS has authority to "correct errors or omissions of members, contracting agencies, or itself, but not to provide the party seeking correction with a 'status, right, or obligation not otherwise available' under the PERL." (*City of Pleasanton v. Board of Administration of the California Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 544.) CalPERS cannot accept the additional compensation as compensation earnable when it is only available to Respondents Bacon and Hurt and unavailable to other lieutenants. Doing so would provide Respondents Bacon and Hurt a right contrary to the definition of payrate. (Gov. Code section 20636, subd. (b).)

VI. CONCLUSION

The retirement roll is a "roll of honor," and the Public Employees' Retirement Fund (PERF) is not the employer's reserve for negotiating settlements of lawsuits alleging

wrongful failures to promote and other employment law violations. Here, the City was able to extricate itself from a lawsuit filed by two disgruntled police officers by agreeing to provide them top-level captain's pension, in exchange for them never working for the City again, without ever promoting them to captains. Respondents Bacon and Hurt worked as lieutenants and retired as lieutenants. They were never promoted through the rules of civil service and were never required to perform the duties of captains. Instead, the Settlement Agreement terms required that they go on administrative leave and retire, in return for receiving the additional compensation. The payments under the Settlement Agreement are not payrate and are a classic example of "final settlement pay" which, by statutory definition, cannot be included in final compensation. Staff respectfully requests that the Board of Administration deny the appeals of Respondents Bacon and Hurt.

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