

**ATTACHMENT B**  
**RESPONDENT'S ARGUMENT**

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7 Attorneys for Respondents  
8 TIMOTHY BACON and DARRYL HURT

9  
10 **BEFORE THE BOARD OF ADMINISTRATION**  
11 **CALIFORNIA PUBLIC EMPLOYEES 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.

Agency Case No. 2012 0190

OAH No. 2014090777

19 In the Matter of the Appeal of Final  
20 Compensation:

21 TIMOTHY BACON,

22 AND

23 CITY OF RIVERSIDE

24 Respondents.

Agency Case Nos. 2012 0191

OAH No. 2014090781

**RESPONDENT'S ARGUMENT**

Full Board Hearing: 2/18/2016

25 **I. INTRODUCTION**

26 Respondents Darryl Hurt and Tim Bacon ("Respondents") were denied promotions to the  
27 position of Police Captain based on their First Amendment speech and union activities. As part  
28

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

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

18 Respondents now respectfully ask the Board of Administration ("Board") to grant their  
19 appeal in its entirety.

## 20 **II. THE PROPOSED DECISION**

21 On October 22, 2015, the Hon. Mary Agnes Matyszewskj, Administrative Law Judge,  
22 after hearing evidence from both Respondents and CalPERS, granted Respondents' appeals,  
23 ordering that "[CalPERS] shall include the 'Special Salary Adjustment', reached pursuant to the  
24 settlement agreement, in [Respondents'] final compensation calculation." [Timothy Bacon  
25 Proposed Decision ("Bacon Dec."), 20; Darryl Hurt Proposed Decision ("Hurt Dec."), 19.]. The  
26 proposed decision came before this Board on December 16, 2015, at which time the Board  
27 elected to reject the Hearing Officer's decision and decide the matter for itself at the Conclusion  
28 of a Full Board Hearing.

## **III. ARGUMENT**

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

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

8           Government Code section 20636, subdivision (b)(1), in relevant part defines “payrate” as  
9 “the normal monthly rate of pay or base pay of the member paid in cash to similarly situated  
10 members of the same group or class of employment for services rendered on a full-time basis  
11 during normal working hours...”

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

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

26           CalPERS argument that neither Hurt nor Bacon were promoted via the City’s merit based  
27 process is also misplaced. CalPERS Retirement Program Specialist, Samuel Camacho testified  
28 at the hearing that there is no Government Code requirement as to how an agency is required to  
grant promotions. (RT Hearing 147:12-16). Moreover, CalPERS does not “get into telling the  
agency how to promote their employee...” (RT Hearing 148:14-16). Nor can CalPERS get into

1 telling agencies *why* to promote its employees. Respondents alleged, the City tacitly  
2 acknowledged and the ALJ found, that but for that unlawful conduct, Respondents would have  
3 promoted in the normal course. Their subsequent elevation to the Captain's payrate should  
4 therefore be treated no differently than the correction of a payroll error. All necessary  
5 contributions were made to the retirement system to ensure a Captains retirement, and  
6 Respondents were paid as Captains and worked as such while on leave. And again, *CalPERS*  
7 *offered no evidence at hearing to refute this*. Respondents will therefore receive no greater  
8 benefit than they would have received earlier, absent the delay caused by unlawful retaliation.  
9 (RT Hearing 18:14-17; RT Hearing 71:14-19).

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

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

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

20 "Final settlement pay" means any pay or cash conversion of employee  
21 benefits in excess of compensation earnable, that are granted or awarded to a  
22 member in connection with or in anticipation of a separation from employment.  
23 final settlement pay is excluded from payroll reporting to PERS, in either payrate  
24 or compensation earnable. ¶ For example, final settlement pay may consist of  
25 severance pay or so-called "golden parachutes". [sic] It may be based on accruals  
26 over a period of prior service. It is generally, but not always, paid during the  
27 period of final compensation. It may be paid either lump-sum, or periodic  
28 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. The retroactive  
15 adjustments and continuing pay at the proper (Captain’s rate) in “connection” with retirement;  
16 they were paid in “connection” with a remedial correction of payrate for the purpose of reflecting  
17 Respondents actual and rightful employment status. To suggest that, under these facts, that the  
18 payments were made in “anticipation of” retirement is also inconsistent with the record.

19           The impetus for the payrate increase was *past* conduct—the unlawful failure to promote  
20 Respondents to Captain much earlier, and well before retirement was contemplated. On this  
21 point is important to note that the settlement agreement does not contain a “non-admission” of  
22 liability provision.

23           So it cannot be said based on this record that the payrate increase was in anticipation of  
24 *future* conduct—that is, retirement. To find otherwise would be to hold that once an employee  
25 indicates an expected retirement date, any increase in payrate thereafter, *for whatever reason*, is  
26 “final settlement pay.” That is not so.

27           And as the ALJ notes, Respondents do not seek the inclusion of any arbitrary lump sum  
28 settlement payment. The payments that should be included are those flowing directly from

1 Respondents proper re-classification as Captains. (Compare *Molina v. Board of Administration*  
2 (2011) 200 Cal.App.4th 53 at p. 66 (“*Molina*”). In this case, Respondents’ “back pay was  
3 calculated using publicly available captain payrates, and [their] future pay was to be based on the  
4 publicly available captain payrate and benefits.” [Bacon Dec., 19; Hurt Dec., 18.] Further  
5 untethering Respondent’s payroll correction from their retirements, unlike the pensioner in  
6 *Molina*, Respondents continued to be employed after resolving the case.

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

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

12 Equitable estoppel applies where: (1) the party to be estopped is apprised of the facts; (2)  
13 the party to be estopped intends his/her conduct to induce reliance, or acts in a way that the party  
14 asserting the estoppel has a right to believe reliance is intended; (3) the party asserting estoppel is  
15 ignorant of the true state of facts; and (4) the party asserting estoppel relies upon the conduct to  
16 his injury. (*City of Long Beach, supra*, 3 Cal.3d at 496-97.) Based on the unrebutted testimony  
17 of Senator Roth and Respondents, and the admissions made by CalPERS Analyst Camacho, the  
18 ALJ rightly found these elements to be met. [Bacon Dec., 17; Hurt Dec., 16.]

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

24 Here, there is a strong public interest in ensuring that cities do not retaliate against  
25 employees for engaging in constitutionally protected activities. The public also has a strong  
26 interest in ensuring that members can rely on material representations from CalPERS. And there  
27 is also no countervailing harm to the public interest if CalPERS is estopped in this case. This is  
28 largely because CalPERS has the statutory authority, and obligation, to do exactly what it is  
asked to do—include in Respondents’ final compensation calculations payments made pursuant

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to the publicly available pay schedule for similarly situated employees of the same class.  
(Compare *Medina*, 200 Cal.App.4th at p. 870.)

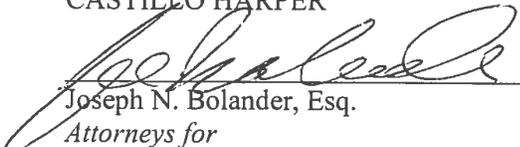
**IV. CONCLUSION**

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

Dated: February 4, 2016

Respectfully submitted,

CASTILLO HARPER

  
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Joseph N. Bolander, Esq.  
*Attorneys for*  
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 **February 4, 2016**, I served the following document described as **RESPONDENT'S 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:

<b>BOARD SECRETARY PO BOX 942701 SACRAMENTO, CA 94229-2701</b>	
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- 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). **USPS TRACKING NO.: 9470 1036 9930 0021 0778 64**
- 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 February 4, 2016 at Ontario, California.

  
\_\_\_\_\_  
Nancy Adams