EXHIBIT A

ORIGINAL PROPOSED DECISIONS

PROPOSED DECISION FOR TIMOTHY BACON

ATTACHMENT A

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Calculation of Final Compensation of: TIMOTHY BACON, Respondent, and CITY OF RIVERSIDE, Respondent.	Case No. 2012-0191 OAH No. 2014090781

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on May 28, 2015.

Preet Kaur, Staff Attorney, represented petitioner Renee Ostrander, Acting Division Chief, Customer Account Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Joseph N. Bolander, Gaspard, Castillo, Harper, APC, represented respondent Timothy Bacon who was present throughout the hearing.

Neil Okazaki, Deputy City Attorney, represented respondent City of Riverside.

On January 22, 2015, this matter was consolidated with the case entitled, *In the Matter of the Calculation of Final Compensation of: Darryl Hurt,* OAH No. 2014090777, and these two cases were heard together. The parties' request to submit written closing arguments was granted, and the matter was submitted on September 28, 2015.[1]

[1] Mr. Bacon's closing brief was marked and received as Exhibit A. CalPERS's closing brief was marked and received as Exhibit B. The city's waiver of closing argument was marked and received as Exhibit C. The city reserved the right to respond to any rebuttal argument. CalPERS's objection to that reservation was overruled. Mr. Bacon's reply brief

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED October 23 20 15

ISSUE

Can compensation in the form of a "special salary adjustment" pursuant to a settlement agreement between Mr. Bacon and the city be included in the calculation of Mr. Bacon's final compensation?

SUMMARY

Mr. Bacon was a police lieutenant who filed a federal lawsuit against the city alleging he was wrongfully passed over for promotion to captain. Mr. Bacon resolved his litigation via a settlement agreement. The terms of the agreement provided that the city would award Mr. Bacon back pay as if he had been promoted, would pay him all salary and benefits in the future at a captain's rate, would purchase service credits to allow Mr. Bacon to retire with 30 years of service, would place him on administrative leave, and later Mr. Bacon would retire. During the negotiations, the city contacted CalPERS to discuss the proposed settlement. CalPERS did not voice any concerns about it to the city.

Mr. Bacon agreed to the settlement because he would be compensated at the captain rate, and it would be factored into his retirement calculations. The city conferred with CalPERS before offering the settlement to Mr. Bacon. Thereafter, CalPERS objected to that new compensation being used in Mr. Bacon's retirement calculations. In support of its position, CalPERS's relied heavily on the job titles used in the documents and the statements made when the settlement agreement was placed on the record in the underlying matter, as opposed to the clear intent of the parties. To adopt CalPERS's position would be to ignore the realities of the litigation. Mr. Bacon sued the city because he had been wrongly passed over for promotion. In the litigation he sought to be promoted to captain and/or receive captain benefits. That was the sole basis of his lawsuit.

Mr. Bacon is entitled to have his "Special Salary Adjustment" included in his final compensation calculation.

FACTUAL FINDINGS

Jurisdictional Matters

1. On September 14, 2011, CalPERS notified Mr. Bacon and the city that some of Mr. Bacon's compensation reported to CalPERS did not qualify as "compensation earnable" for purposes of determining his final compensation calculation.

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was marked and received as Exhibit D. CalPERS's reply brief was marked and received as Exhibit E. The city did not file a rebuttal brief.

Mr. Bacon and the city appealed that determination. On September 19, 2014, CalPERS filed its statement of issues, Mr. Bacon and the city filed notices of defense, and this hearing ensued.

Employment History

2. Mr. Bacon was employed as a peace officer with the city's police department for approximately 25 years, until he retired in 2010. The city is a public agency contracting with CalPERS for retirement benefits for its eligible employees. By virtue of his employment, Mr. Bacon was a local safety member of CalPERS. While a peace officer, Mr. Bacon was active in the Riverside Police Administrators' Association (RPAA), eventually being appointed by Mr. Hurt to serve on the RPAA Political Action Committee.

Federal Litigation and Settlement Agreement

3. Because of his political activism, Mr. Bacon believed he was retaliated against at work and sued the city and several city employees in federal court for violating his rights. His lawsuit was consolidated with Mr. Hurt's federal lawsuit. That litigation was eventually settled between the parties. The settlement agreement was placed on the record but never reduced to writing. The only documentation of the agreement is the federal court's April 12, 2010, transcript. Richard Roth, then a city attorney who represented all of the city defendants, made the following recitation on the record:

> [T]he parties have reached a settlement in this matter. And as part of the settlement, that plaintiffs Hurt and Bacon have agreed to execute a settlement agreement and general release fully releasing defendants as to all claims and containing the following essential terms, among others:
>
> 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.
>
> And both will execute and return a completed retirement application concurrent with the execution and return of the settlement agreement document.
>
> Within 30 days of receipt by the City of a fully executed original of the settlement agreement, the City will pay to Hurt and Bacon additional compensation from January 25, 2008, to today's date per the captain pay scale and during the administrative leave period provided for in a bit or before the City will ensure that both receive at least 12 months of

> compensation at the top-step captain rate prior to their retirement.
>
> Upon retirement Hurt and Bacon will be entitled to receive all benefits normally accorded retiring police officers under City policy.
>
> Prior to January 19, 2011, in the case of Lieutenant Hurt, and July 17, 2010, in the case of Lieutenant Bacon, the City will pay to them a sum sufficient to allow them to purchase additional service credits under the California Public Employees Retirement System rules and regulations in order to enable them to retire with 30 years of service.
>
> The City will place Lieutenants Hurt and Bacon 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.
>
> On or before January 19, 2011, the City will pay to Lieutenant Hurt the sum of $300,000 as non-economic damages and on or before July 17, 2010, pay to Bacon the sum of $250,000 as non-economic damages. (Transcript, Exhibit 7, page 2, line 1 - page 3, line 15.)

The city attorney recited other terms regarding attorneys' fees and confidentiality, and the parties took a break in the proceeding to further negotiate the confidentiality provisions. (Transcript, Exhibit 7, page 3, line 16 - page 8, line 22.) At the conclusion of the additional negotiations and recitations, the federal judge asked Mr. Bacon if they reflected "the terms of the settlement as you understand them," to which he replied in the affirmative. The federal judge noted that "the settlement is not contingent upon it being successfully reduced to writing." (Transcript, Exhibit 7, page 10, lines 8-14.)

The transcript documented that although a settlement in principle was reached, it was not fully completed. When questions regarding the confidentiality provisions of agreement were raised, the federal judge said, "Well, look, it's not a time to negotiate this. I'm not going to try to sit up here and negotiate it for you. If you want to settle the case, that's fine. If you want to have an opportunity to talk with the City about it, see if you can reach some resolution, that's fine." (Transcript, Exhibit 7, page 6, lines 20-24.) The federal judge instructed the parties to work together in the future to come up with satisfactory language agreeable to both sides. In addition to leaving an impression of haste, it was clear from reading the transcript that the settlement was not finalized, as all of the terms were not set forth and the parties would continue having discussions when they left the courthouse. The transcript set forth the general outline of the settlement, but not the final details, and the

federal judge stated several times that the parties would be preparing final documents over the next 30 days, even going so far as to note that they were welcome to come back to court to enforce terms of the agreement, but that the lack of documentation would not derail the settlement. (Transcript, Exhibit 7, page 10, line 21 – page 11, line 13.)

CalPERS's Documents

4. Mr. Bacon's CalPERS payroll detail report from 2008 to 2010 contained entries identified as regular payroll and special compensation. The document reflected the change in Mr. Bacon's CalPERS' contributions and income following the settlement of his litigation.

5. An April 14, 2010, CalPERS's Customer Touch Point (CTP) entry documented contact between a CalPERS analyst and Mr. Bacon. The CalPERS analyst documented that CalPERS provided materials to Mr. Bacon regarding purchasing service credit. The analyst offered to assist Mr. Bacon with the calculations but he declined, advising the analyst that the city was offering to buy three years of service credit for him. The analyst documented, "Not sure how that was going to work," but it was unclear from that entry to what the analyst referred. Mr. Bacon advised the analyst that the city may also change his pay rate retroactively.

6. A June 3, 2010, CTP note indicated that the employer called regarding Mr. Bacon's service retirement status and was advised that the application was on file. Another note on that date documented: "Special Compensation was not included in estimate. It needed to be verified by Compensation Review." On June 22, 2010, Mr. Bacon called to verify his final compensation for retirement calculations and was advised the calculations were not complete.

7. On June 28, 2010, Mr. Bacon completed a Disability Retirement Election Application identifying his position title as "Police Lieutenant," and stating that he was currently working full-time. Mr. Bacon identified his treating physician and noted that his limitations/preclusions due to his injury were, "Cannot stand for long periods of time, very limited mobility, ongoing pain. Cannot walk without limping. Hard time lifting." Mr. Bacon noted that his injury affected his ability to perform his job because he "cannot complete daily tasks, makes my ability to perform impossible."

8. September 2010 CTP entries documented CalPERS's calculations regarding whether purchasing service credits would be beneficial in light of the disability retirement. CalPERS determined that it would not be beneficial because it would not increase Mr. Bacon's disability retirement allowance. Of note, in its calculations, CalPERS used a pay rate for Mr. Bacon of $14,625.64, stating that this amount was "the monthly pay rate of $12,603.55 plus special compensation of $2,022.09." Thus, CalPERS used Mr. Bacon's captain's payrate to perform its calculations, and those calculations are what CalPERS used to answer Mr. Bacon's question about a possible disability retirement.

9. An October 5, 2010, CTP entry documented that Mr. Bacon advised that he was no longer interested in pursuing the purchase of service credit because he "has already received a settlement from a lawsuit that was in process with his employer." Mr. Bacon asked CalPERS to close his request to purchase service credits.

10. On October 19, 2010, Mr. Bacon requested information on the payroll reported, and he was transferred to a manager. The manager documented that information regarding the timeframe for the adjustment in Mr. Bacon's monthly benefit was provided to him.

11. A December 13, 2010, CTP entry documented that CalPERS advised Mr. Bacon of the "golden handshake processing timeframe." It is unclear who used that phrase. CTP notes in December 2010 and February 2011 indicated follow-ups and referrals regarding adjustments to Mr. Bacon's account.

City Documents

12. The city's October 2010 Salary Schedule noted that top-step police lieutenants earned a monthly salary of $11,563.

13. The city provided CalPERS with information regarding Mr. Bacon's salary as requested. The city reported to CalPERS that effective March 23, 2006, Mr. Bacon's monthly salary was $14,588.54 and his special compensation included payment for holiday and uniform pay, Police Department management advanced certification, and retroactive pay for Police Department management advanced certification.

14. In response thereto, CalPERS advised that Mr. Bacon's salary exceeded the maximum amount allowed in the top-step lieutenant category. In reply, the city provided CalPERS with the Personnel Action Form for Mr. Bacon. The form identified Mr. Bacon's job position as "police lieutenant," and noted he received a "Special Salary Adjustment Pursuant to Settlement."

15. Mr. Bacon's payroll stubs documented earnings for regular hours and earnings for Police Department management. His payroll stubs also documented his withholdings and contributions, noting the sums paid towards his retirement benefits. Mr. Bacon and the city made contributions based on his captain's payrate.

CalPERS's Determination

16. In its September 14, 2011, letters to Mr. Bacon and the city, CalPERS noted that the city reported Mr. Bacon's monthly payrate for the period July 2009 to July 2010 as follows:

$12,603.55 - 07/09 to 05/10 which equals $11,562.89 in payrate and $1,040.66 of 9% Employer Paid Member Contributions (EPMC)

$14,588.49 - 06/10 to 07/10 which equals $13,383.93 in payrate and $1,204.56 of 9% EPMC.

CalPERS noted that according to the publicly available salary schedule, the maximum monthly salary allowed for a police lieutenant position was $11,563. Further, CalPERS wrote that it had reviewed the requested documentation provided by the city, including the Personnel Action Form indicating that the special salary adjustment was pursuant to a settlement agreement. Based upon its review, CalPERS determined that the city had reported compensation that did not comply with the law.

CalPERS asserted that compensation reportable must meet all the criteria outlined in Government Code section 20636 and the regulations. CalPERS claimed that the reported earnings did not meet that criteria and requested that the city correct the reported increased monthly pay rate of $14,588.49 to the correct pay rate of $12,603.55, which included EPMC, for the June and July 2010 reporting period "in order to recover the contributions paid for this benefit." CalPERS further noted that Mr. Bacon's "current monthly retirement allowance has already taken this adjustment into account." CalPERS advised the city and Mr. Bacon of their right to appeal CalPERS's determination.

Witness Testimony

17. Mr. Hurt testified that he was hired as a police officer in 1982. He was promoted to sergeant 10 years later and promoted to lieutenant in 1995. Mr. Hurt testified that, in January 2011 he retired as a captain, testifying, "I believed it was captain." Mr. Hurt received numerous commendations and awards during his career, including medals of valor and meritorious valor, first level awards, and personal recognitions. Mr. Hurt was involved with the Police Administrators' Association and interacted frequently with the city council. Mr. Hurt testified about his union activities, his election to president of the Association, and his contentious interactions with the police captain and city council, primarily centering on a plan to change the promotion system, which many police officers opposed. Mr. Hurt testified that the promotion to captain was originally a very informal process, but then became more formalized and was based on education, experience and an interview process with the chiefs. Mr. Hurt went through the process, was placed on the eligibility list, and believed he was passed over for promotion to captain because of his union activities. Mr. Hurt believed he was retaliated against at work and filed a federal lawsuit in 2009.

Mr. Hurt testified about the settlement agreement. After a "day-long settlement conference," the parties reached a verbal agreement that the city's attorney read into the record. A written agreement "never happened." Mr. Hurt testified that when he received a printout of the transcript, he had "questions and issues" regarding what he believed the parties had negotiated and he emailed his attorney with his concerns. There followed an

exchange of emails, with some of Mr. Hurt's concerns centering on the language in the transcript referring to him as "lieutenant" and not "captain." Mr. Hurt explained that the parties agreed that Mr. Hurt would be compensated at the captain rate with all the benefits of a captain, he received back pay at the captain's rate, and he "retired with all benefits of a captain's position."

Mr. Hurt acknowledged that, as part of the settlement agreement, he was required to retire and in return he would be paid at the higher payrate. However, even though he was placed on administrative leave as part of the settlement, Mr. Hurt was required to perform various duties, make certain appearances, appear by telephone, and remain in contact with the department. Mr. Hurt remained in possession of his badge, his weapon, and all of his police powers. Additionally, separate and apart from the captain's pay benefits portion of the settlement, there was a damages settlement. Mr. Hurt believed that the captain's pay he received in the settlement would be factored into his retirement. His belief was based on the fact that the parties had negotiated an agreement whereby he and Mr. Bacon would receive top-step captain pay at retirement. As Mr. Hurt credibly testified, "We would not have agreed to anything else in the legal process having gone that far."

Mr. Hurt believed that the parties put the retirement term in the agreement and during the negotiations he asked about retirement with CalPERS. Mr. Hurt's attorney told him the parties were discussing that with CalPERS. During the settlement discussions, Mr. Hurt's attorney told him that CalPERS had informed the city attorney that Mr. Hurt's settlement would be structured at the captain's pay rate. It did not "stick out" to Mr. Hurt until he received a copy of the transcript and read the word "lieutenant" that he thought it should read "captain" because that was what the parties had negotiated.

Mr. Hurt testified, "I would not have accepted the settlement without assurance that the captain's pay would be part of my pension retirement." As he credibly explained, "If we had not accepted that, we'd be where we already were, [at] top-step lieutenant, and we were in court ready to go, and if I ever thought that I was not a captain, I would not have retired when I did. I planned my retirement at the captain's pay." As he explained, one of the remedies he and Mr. Bacon were seeking in their litigation was promotion to captain. They were paid the higher rate in exchange for settling their lawsuit, and they dismissed their lawsuit in exchange for that consideration. Based on the settlement agreement, he believed he and Mr. Bacon were captains.

Mr. Hurt also testified that he is someone "who always does what he says he is going to do" and is upset by the fact that he believes people have backed out of the deal he thought the parties reached. During the settlement discussions, there were times when the attorneys talked by themselves, and he and Mr. Bacon were not involved in those discussions. It was his understanding that he and Mr. Bacon were negotiating for retirement at the captain's rate, and the city paid him the top-step captain pay until he retired. It was his understanding that he would retire at the top-step captain rate, and his retirement would be at that rate. He understood that the city would pay into CalPERS for those retirement benefits, and he has no evidence that the city did not do what it was supposed to do. Mr. Hurt testified about the

negative fiscal impact the difference in retirement pay between a captain's pay and a lieutenant's pay has caused him and his family. Mr. Hurt testified that he was "surprised" when he received CalPERS's letter advising him that his top-step captain's pay would not be included in his retirement benefits.

Mr. Hurt testified in a straightforward and direct manner, answering all questions posed to him. His testimony was credible and persuasive.

18. Timothy Bacon was hired as a police officer in 1982. He became a sergeant in the early 1990s and made lieutenant in 1995. He retired on July 16, 2010, "as a captain." During his career he received many distinguished service awards and at least 50 commendations. He served on several task forces. While serving as a school police officer, Mr. Bacon was the only school police officer ever nominated as Riverside Police Officer of the Year. During his career, Mr. Bacon was involved in the largest murder conspiracy case in the United States, involving the investigation and arrest of 30 individuals. He created the gang unit and other units within the department.

Mr. Bacon was elected as an officer in the Association. Because of their political activities with the union, he and Mr. Hurt were targeted at work. Due to this employment retaliation, Mr. Bacon filed a federal lawsuit that was consolidated with the one filed by Mr. Hurt. There was one settlement for him and Mr. Hurt; there were not separate settlement agreements. Mr. Bacon testified that the city attorney placed the settlement on the record "moments after approval from the city and our attorney that we'd be made top-step captains with back pay." Mr. Bacon testified that the agreement happened "quickly" and "got approval." He testified that the city "met our terms with the approval of CalPERS and [the agreement] went through." Although verbally stated in court, Mr. Bacon thought the agreement would be reduced to writing.

During questioning at this hearing, Mr. Bacon asked if he could dispense with the direct examination format and just describe what happened at federal court. His request was granted. Mr. Bacon testified that "in a nutshell" when he went into chambers with the federal judge, everyone in the room was afraid of the federal judge, but he looked the federal judge square in the face, pointed to the federal judge's eagle emblem, and told him, "That eagle means something to me. It means something to [Mr. Hurt]. I love that bald black guy [Mr. Hurt]." The federal judge sat back in his chair and asked Mr. Bacon what he wanted. Mr. Bacon told the federal judge that he wanted "top-step captain," that he knew the city was going to want him and Mr. Hurt to retire, that he wanted back pay at the captain's rate, and that he wanted $250,000. He then left chambers, and Mr. Hurt was brought in with his attorney to separately discuss his settlement requests.

Mr. Bacon testified credibly that, "This was huge. I have young kids; I loved what I did; I worked hard to get to that point in my career." Mr. Bacon testified. "We had a great case. I loved the city of Riverside, but it was a case of right or wrong." Further, "We had a great case, not a good case, a great case." He "absolutely" believes they could have gotten more if they had gone to trial.

Mr. Bacon testified that, pursuant to the settlement, he would receive back pay to the date when he should have been promoted to captain, that he would receive top-step captain pay for a captain with 30 years of service even though he only had 27 and one-half years of service, that "the city would pay money to CalPERS" to increase his service credit to 30 years, and that he would receive the top-step captain's wage. Mr. Bacon testified that he wanted to retire at the top-step captain rate with 30 years' service credit. As part of the settlement, he and Mr. Hurt had to go to the CalPERS office "expeditiously" to fill out their retirement applications because Mr. Hurt was approaching his 50th birthday before Mr. Bacon. Additionally, per the settlement agreement, Mr. Bacon would receive $250,000 in damages. Mr. Bacon testified that the rank of captain was separate from the $250,000 damages because that money was being paid "in order for us to right our wrong;" it had nothing to do with the top-step captain's pay.

Mr. Bacon testified that he believed his captain pay would be part of his retirement because this is what he was told by the city attorney and his personal attorney. He was told that the agreement was "good to go" and that everybody had accepted it. Mr. Bacon testified that his and Mr. Hurt's attorneys were in the hallway; they were elated; he and Mr. Hurt got pulled into a separate room and were told: "this is happening." The two attorneys told him and Mr. Hurt that, "All is good, we got approval, we're good to go." Mr. Bacon testified that all the attorneys were pretty elated that the settlement had been reached but he was shocked that his career was going to possibly come to an end; it was "very surreal" for him. Mr. Bacon would have continued working if he had not been guaranteed the captain's retirement because he loved what he was doing.

When they were in chambers, Mr. Bacon told the federal judge, "I am not stupid; I know the city will want us to retire." As he predicted, the agreement required him to be placed on administrative leave and retire. Mr. Bacon had never been placed on administrative leave before, so was not familiar with it; he was discussing retirement during the negotiations. Mr. Bacon testified that he would have loved to have returned to work, make an impact, and serve his community. Mr. Bacon performed services while on administrative leave. Most significantly, he was involved in police efforts to oppose the release of a convicted murderer on parole.

Mr. Bacon testified credibly that he would not have accepted the settlement agreement unless he knew CalPERS had agreed to it. He would have gone to trial. As he testified, "I would not have accepted the settlement unless I believed the pension benefits would be at the captain pay rate; absolutely not." Mr. Bacon testified that he would not have retired unless he believed he was retiring at the captain's payrate. Mr. Bacon testified that, to this day, he gets addressed as "captain" by his troops and current captains and that he "walked out of there [the department] as a captain." Moreover, as he passionately testified, "I would not have sold my soul for lieutenant."

Mr. Bacon testified that he was "completely shocked" when he received CalPERS's letter advising him that "we were not going to get what we agreed to in federal court." Mr. Bacon has been "absolutely negatively affected" by receiving the lesser pension.

Mr. Bacon made a straightforward, no-nonsense, Wilford Brimley-appearing witness. He testified in a sincere manner, making direct eye contact, with a very self-assured posture, answering all questions posed to him. His testimony was powerful, credible, and persuasive.

19. State Senator Richard D. Roth, who was then a Riverside city attorney, represented the city defendants in the federal litigation. Senator Roth testified that during the process of negotiating the settlement, he, the city's Human Resources Deputy Director, another city employee, and Supervising Deputy City Attorney Jeff Brown, conducted a conference call with CalPERS. The purpose of the conference call was to outline the proposed settlement to CalPERS. Based on that conference call, Senator Roth's understanding was that CalPERS had no objections to the settlement the city was proposing, to wit, retroactive payment at a captain's payrate and paying the men at a captain's payrate until they retired.

The city outlined the parameters of the settlement for CalPERS. Senator Roth testified that the litigation was "a failure to promote case," and the settlement would include back pay from the date of the alleged failure to promote. As Senator Roth explained, the officers sued, contending they should have been promoted to captain; the city acquiesced; the city agreed to settle as if the men had been promoted and received a salary at the higher payrate, and the men would be allowed to retire at the higher payrate. Senator Roth testified that the settlement involved a significant amount of money: back pay at the captain rate for both men, 12 months or so of upfront pay while at the top-step captain rate, and their retirements would be calculated at the top-step captain rate.

The city also discussed with CalPERS that Mr. Hurt and Mr. Bacon would be on administrative leave for at least 12 months so that they could receive captain's pay at the top-step pay while on administrative leave. Following that administrative leave, at two different points in time, the men would retire because they were on two different time frames: Mr. Hunt would retire in July 2011, and Mr. Bacon in July 2010 or thereabouts, and they would retire at the captain payrate.

Senator Roth participated in the conference call with CalPERS because he wanted to make sure that when he was proposing the settlement, that it was one that would work. Although Senator Roth is not a CalPERS expert, he "wanted to have some comfort level" that he was proposing something that would work. The reason for his call to CalPERS was to discuss what he would be proposing in federal court. Senator Roth testified that he did not want to be in a position of proposing something that would not work. Based upon what he heard during the telephone conference, he believed the proposal would work. It was Senator Roth's understanding, following that telephone conference with CalPERS, that the proposed settlement was acceptable to CalPERS: Mr. Hurt and Mr. Bacon would be permitted to retire as if they were captains; their retirement would be based on the captain payrate; they would be paid back pay at the captain's payrate; and they would receive captain pay while on administrative leave.

Senator Roth acknowledged that he was not familiar with CalPERS's processes. He did not know one way or the other if the conference call constituted a "final determination," or if any more work was required to effectuate the matter with CalPERS. He was not aware of any written confirmation from CalPERS regarding the settlement. However, as Senator Roth credibly and persuasively testified, he needs to have credibility with the court, his colleagues, and the parties, and he would never want to propose something in federal district court that would not work. Senator Roth assumed that if there was a problem with the city's proposed settlement, it would have been identified to him during the conference call with CalPERS. There was no objection to that proposal raised during the conference call, so Senator Roth felt comfortable proposing the settlement in federal court.

After that conference call, Senator Roth told Mr. Hurt's and Mr. Bacon's attorneys that the men would be retired at the captain's pay. Senator Roth told Mr. Hurt's and Mr. Bacon's attorneys what the city was proposing, namely, the city would pay damages, place the men on administrative leave and retire them and pay them at the captain's payrate. Senator Roth recalled telling the attorneys that they needed to verify the city's proposal with CalPERS if they had any questions.

Senator Roth testified that he "did not really touch on the retirement," and did not go into details about the retirement when he placed the settlement on the record because that was "a little bit outside of the purview of what we are doing." It was "outside of the purview" of the agreement. By that he means that the settlement would require the officers to retire on certain dates but that would require work on their part - they would have to file retirement applications with CalPERS, and this was a process outside of the federal court proceeding. Senator Roth testified that the retirement consequences of the payments were not discussed in the federal court minutes.

After leaving court, Senator Roth reduced the agreement to writing and circulated a draft to the attorneys, but there was disagreement regarding the nature and extent of the confidentiality provision, so a written settlement agreement was never executed. When the parties could not agree on the confidentiality terms, Senator Roth decided to rely on the transcript and stated, "Frankly the judge made that clear in the transcript that that would be the case." Thus, the parties were left with what was embodied in the printed transcript.

Mr. Bacon, who testified after Senator Roth, completely agreed with Senator Roth's testimony. Mr. Bacon stated that Senator Roth's testimony accurately reflected the settlement discussions that took place in federal court.

20. Samuel Kamacho, CalPERS Retirement Program Specialist II, whose duties include reviewing compensation reported, testified about CalPERS's determination of Mr. Bacon's final compensation. Mr. Kamacho was not the analyst who initially worked on this matter, but was called upon to testify in this proceeding. Mr. Kamacho was not involved with the conference call with the city officials and has never spoken with Senator Roth or any city officials about the settlement.

Mr. Kamacho explained the categories CalPERS considers to determine compensation earnable. Government Code section 20636 provides two parts to compensation earnable: payrate (the monthly base pay given to similarly situated groups of employees pursuant to a publicly available pay scale) and special compensation (earnings based on knowledge, special skills, training, work hours, etc.). CalPERS uses the group or class an employee is placed in by the public agency to determine the payrate for the employee using the public agency's publicly available pay scale, as well as labor agreements and labor policies that have been approved by the public agency's governing body.

Mr. Kamacho testified that it is "very common" for CalPERS to determine that compensation reported does not qualify as final compensation. CalPERS still has to analyze the earnings reported to ensure that the compensation is funded and that there are no compliance issues. CalPERS is trying to curb pension spiking and make sure that agencies comply with the Government Code that defines final compensation and compensation earnable. CalPERS must ensure that it and the public agencies comply with the law. Adjustments to final compensation can be made even after members retire.

Mr. Kamacho testified about the reasons why Mr. Bacon's reported income did not qualify as compensation earnable: the higher pay rate was for the last few months of employment; it was paid in anticipation of retirement/separation from employment; Mr. Bacon was a police lieutenant, and his reported income exceeded the publicly available pay schedule for lieutenants; his settlement was for one person, not a group or class; he identified his position title as lieutenant on his CalPERS retirement application form; and nothing in the CTP documented that CalPERS advised the city that the settlement proposal was acceptable.

Mr. Kamacho acknowledged that all of the city's contributions were made at the captain pay rate. However, this could still create an unfunded liability because CalPERS does not just use the contributions information when making its decisions; it also considers whether the payrate increases are anticipated, whether they are pursuant to publicly available payrate schedules, and whether all employees are getting the same increases.

Mr. Kamacho acknowledged that if the city's Personnel Action Form stated that Mr. Bacon was a "captain" that would change his opinion. Instead, that document identified his job position as "lieutenant" and gave him the higher pay as a "Special Salary Adjustment Pursuant to Settlement." As Mr. Kamacho understood the settlement, the officers were going to retire and receive a payrate increase in exchange for that retirement. Mr. Kamacho admitted that the Government Code does not require that employees be placed in their job positions by promotion only. He admitted there are no restrictions as to how employees obtain their job titles; CalPERS does not tell employers how to conduct promotions. Mr. Kamacho admitted that the absence of a CTP note was not definitive evidence that the conference call did not take place, acknowledging that there are times when things are not documented in the CTP. Mr. Kamacho had no reason to believe that Senator Roth was lying and did not dispute that a telephone conference took place.

Mr. Kamacho testified that public agencies contact CalPERS personnel directly "all the time" requesting information on how to report compensation. However, in these conversations, CalPERS is not making a "final determination" so it is not bound by those conversations, although "hopefully [CalPERS] is giving the correct responses" to the inquiring public agency. Mr. Kamacho testified that "a phone call or email is not a 'final determination' in any sense." When asked whether he thought it was fair to assume that discussions after the telephone call were final, Mr. Kamacho testified that he did not know what the city understood following that conference call. However, Mr. Kamacho agreed that it is not unreasonable for a public agency to rely on the information given by CalPERS "in this complex area of law." When asked whether he thought an employer would act in accordance with the advice given by CalPERS, Mr. Kamacho replied, "If they believe we are giving accurate information, they would take our information as correct and act accordingly." However he testified that it is a "common understanding" that information given this way is just informational, "it is not the be-all and end-all." Moreover he was "pretty sure" that incorrect information has been given out and was "pretty sure" he himself had given out wrong information. When asked what legal recourse a member had if an employer acted on that incorrect advice to the members' detriment, Mr. Kamacho testified that there was "the appeal process."

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for retirement benefits has the burden of proving that he is entitled to it. (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54).

2. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Applicable Code Sections

3. Government Code section 20630 defines "compensation."

4. Government Code section 20636 defines "compensation earnable" as the "payrate and special compensation of the member as defined by subdivisions (b), (c), and (g) and as limited by section 21752.5."

5. Government Code section 20636, subdivision (b)(1), 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. 'Payrate,' for a member who is not in any group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours . . . ."

6. Government Code section 20636, subdivision (c), provides the exclusive list of items that are considered "special compensation," which items include payment a member receives for special skills, knowledge, abilities, or work assignment. Special compensation does not include final settlement pay, payments made for additional services rendered outside normal working hours or other payments the board has not affirmatively determined to be special compensation.

7. Government Code section 20636, subdivision (f), defines final settlement pay 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." This subdivision further states, that the "board shall promulgate regulations that delineate more specifically what constitutes final settlement pay."

8. Government Code section 20636, subdivision (g)(1), defines compensation earnable as "the average monthly compensation, as determined by the board, upon the basis of the average time put in by members in the same group or class of employment and at the same rate of pay, and is composed of the payrate and special compensation of the member."

9. Government Code section 20636, subdivision (g)(2), defines payrate as "the average monthly remuneration paid in cash out of funds paid by the employer to similarly situated members of the same group or class of employment, in payment for the member's services or for time during which the member is excused from work because of . . . leave of absence."

10. Government Code section 20636, subdivision (g)(4)(G), provides that payrate and special compensation do not include final settlement pay.

Regulatory Authority

11. California Code of Regulations, title 2, section 570, provides:

> "Final settlement pay" means any pay or cash conversion of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.
>
> For example, final settlement pay may consist of severance pay or so-called "golden parachutes". [sic] It may be based on accruals over a period of prior service. It is generally, but not always, paid during the 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.

12. California Code of Regulations, title 2, section 571, subdivision (a), exclusively identifies those items that may be included in "special compensation." Subdivision (b)(2) provides that special compensation must be "available to all members in a group or class."

Applicable Case Law

13. The court in *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478-1479, summarized the general principles governing determination of a public employee's retirement allowance:

> Under the PERL, the determination of what benefits and items of pay constitute 'compensation' is crucial to the computation of an employee's ultimate pension benefits. The pension is calculated to equal a certain fraction of the employee's 'final compensation' which is multiplied by a fraction based on age and length of service. . . . 'Final compensation' is the 'highest average annual *compensation earnable* by a member during the three consecutive years of employment immediately preceding the effective date of his retirement' or other designated consecutive three-year period. . . . Both the employer and the employee are required to make contributions to the system, based on a percentage of 'compensation.'

CalPERS's Request for Official Notice

14. CalPERS filed a Request for Official Notice attaching a CalPERS decision and excerpts from city documents. The *City of Bell* decision is not controlling because it is not precedential, and its facts are distinguishable. In *Bell*, the employee's salary was not based on a publicly available payrate. Here, the settlement agreement tied Mr. Bacon's rate of pay to the publicly available captain payrate. Moreover, Mr. Bacon's settlement agreement was created to right a wrong, namely the wrongful passing over of Mr. Bacon for promotion. Such was not the case in *Bell*. Additionally, nothing in the attached city documents is at odds with the findings reached in this matter. Absent the title, the settlement agreement made Mr. Bacon a police captain subject to all the benefits of that position as outlined in the publicly available documents.

Equitable Estoppel

15. With regard to the well-established doctrine of equitable estoppel, "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." (*Seymour v. Oelrichs* (1909) 156 Cal. 782, 795, quoted in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488.)

16. "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury . . . . The doctrine of equitable estoppel may be applied against the government where justice and right require it." (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305-306.) The party asserting the estoppel bears the burden of proof. (*Killian v. City and County of San Francisco* (1978) 77 Cal. App. 3d 1, 16.)

17. "The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*City of Long Beach v. Mansell, supra,* 3 Cal.3d at 496-497.)

18. However, it is generally "held that the power of a public officer cannot be expanded by application of this doctrine." (*Page v. City of Montebello* (1980) 112 Cal.App.3d 658, 667.) In other words, the doctrine may not be applied when doing so "would have the effect of granting to the state's agents the power to bind the state merely by representing that they have the power to do so." (*Ibid.*)

19. Applying the elements of equitable estoppel, the evidence established that (1) CalPERS was fully apprised of the settlement agreement; (2) CalPERS did not raise any objection to the settlement at the time it was reached and thereafter reported to CalPERS; (3) neither Mr. Bacon nor the city had knowledge that CalPERS would not include the salary increase in Mr. Bacon's retirement calculations; and (4) Mr. Bacon relied on CalPERS's representations to his detriment, as he only agreed to the settlement because of the assurances that his salary increase would be included in his retirement calculations. Thus, CalPERS is equitably estopped from now asserting that Mr. Bacon's "Special Salary Adjustment" not be included in his final compensation calculation.

Evaluation

20. At first blush the settlement agreement appears to fall within the category of final settlement pay, thereby precluding it from final compensation calculations. However, a careful reading of the applicable law, the settlement agreement, and the facts surrounding the settlement demonstrate that certain terms of the settlement agreement do not fall within the definition of "final settlement pay" and qualify as compensation earnable.

This settlement was reached as the result of a failure to promote lawsuit. The goal of this type of litigation is to be promoted and/or receive higher pay the employee should have received if he or she was not passed over for promotion. The entire basis of Mr. Bacon's litigation was that he had been wrongfully passed over for promotion. The city acknowledged that error when it settled with Mr. Bacon and paid him back pay and benefits at the captain rate and future benefits at the captain rate, including retirement. Moreover, Mr. Bacon was not immediately retired; he was placed on administrative leave. Had the 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. Moreover, the settlement was not a conversion of employee benefits, and it was not for an amount in excess of published publicly available pay rates.

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 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 increased salary given to Mr. Bacon, pursuant to the settlement agreement, did not constitute final settlement pay because it did not exceed compensation earnable. To find to the contrary would overlook the underlying facts of Mr. Bacon's case. He sued the city because he had been wrongfully passed over for promotion. He settled his litigation in exchange for being paid at the publicly available captain rate.

To hold otherwise would be to forever preclude CalPERS's members from the ability to sue their employers for being wrongfully passed over for promotion. Surely the Legislature did not intend to tie a public employee's hands and prevent an entire class of individuals (CalPERS members) from being able to file causes of action for failure to promote. If the Legislature did so intend that consequence, it could have affirmatively stated that in the code sections or regulations. As written, the PERL does not preclude the settlement achieved from such a lawsuit from being used in the employee's final compensation calculations in a case with facts such as the ones presented here.

The purpose behind the laws governing final settlement pay is to prevent insidious, "cigar-filled back room deals," like those reached in the City of Bell, where friends give friends golden handshakes, spiking their compensation in an attempt to increase their pensions and paying them exorbitant salaries. However, these laws surely were not intended to prevent employees from suing when they have been wrongfully passed over for

promotion. For the Legislature to intend such a result requires an affirmative statement of such an intention. Nothing in the legislative history of these statutes reveals such an intent.

One final note, the testimony offered by CalPERS that answers given on the telephone or in emails cannot be relied upon as they do not constitute formal final determinations was somewhat disconcerting. Here, the city had high-ranking officials participate in a conference call attempting to settle major litigation. The city relied on the CalPERS's representations made during that conference call. As Senator Roth correctly alluded to, an attorney's reputation is a priceless asset, and no respectable attorney wants to make false representations to a court or offer settlement deals that are hollow and do not resolve the litigation. As Senator Roth credibly and persuasively testified, the city sought CalPERS's input in order to offer Mr. Bacon a valid deal that would be upheld and accepted by CalPERS. It was during that time, and not now after all parties have relied upon that settlement to their detriment, that CalPERS should have objected. Its failure to do so was due to no fault of Mr. Bacon or the city and cannot now be undone.

21. Even presuming that equitable estoppel does not apply, CalPERS's position is still rejected. Mr. Bacon settled his wrongful employment practices litigation by agreeing to receive retroactive pay from the date he should have been promoted to captain and receive all future pay and benefits of a captain. Contrary to the facts presented in *Molina v. Board of Administration* (2011) 200 Cal.App.4th 53, Mr. Bacon's back pay was calculated using publicly available captain payrates, and his future pay was to be based on the publicly available captain payrate and benefits. Further, unlike Mr. Molina, Mr. Bacon continued to be employed after resolving his litigation.

Similarly, CalPERS's reliance on *Prentice v. Board of Administration* (2007) 157Cal.App.4th 983, was misplaced. In that case, the raise was offered only to Mr. Prentice; he was alone in a class of one. Here, the clear, unambiguous language of the settlement agreement placed Mr. Bacon in the police captain class, giving him the pay and benefits of a captain. He was not in a class by himself. Unlike Mr. Prentice, Mr. Bacon's retirement benefits were not "artificially increased." They were set at the publicly available police captain rate. The settlement agreement was open, obvious, and brought to CalPERS's attention before it was offered to Mr. Bacon. It is also worth noting that, by the terms of his settlement agreement, Mr. Bacon ran the risk that if captain benefits were ever reduced or eliminated in the future, he, too, would suffer that reduction/elimination.

CalPERS defined "special compensation" contrary to the facts presented. It was established that Mr. Bacon was wrongfully passed over for promotion and was going to be paid as a captain because of his special skills, knowledge, abilities, or work assignment. The sums were not paid as final settlement pay or for additional services rendered outside Mr. Bacon's normal working hours. The salary and benefits given to Mr. Bacon were "available to all members in the group or class" of captains. Thus the increase in pay qualified as special compensation. Finally, CalPERS's reliance on the job title used by Mr. Bacon in his retirement application, and the job title used by Senator Roth when placing the settlement on

the record, was not persuasive because it put form over substance and was at odds with the clear intent of all the parties - an intent CalPERS was advised of during the conference call.

CalPERS's argument that allowing Mr. Bacon to receive these retirement benefits "will conflict with strong public interest by permitting the city to artificially increase" Mr. Bacon's benefits by providing him with compensation increases unavailable to other lieutenants overlooks the facts of this case. Namely, the city paid Mr. Bacon the captain rate as set forth in the publicly available payrate and publicly available documents. He was paid a salary paid to all other captains. Furthermore, the city informed CalPERS of the settlement agreement, sought CalPERS's input on whether it would be acceptable, and reported it to CalPERS. Thus, CalPERS fears, on the facts presented here, are baseless.

The evidence presented established that Mr. Bacon was in the class of police captains and entitled to all benefits of police captains, including retirement benefits.

ORDER

Timothy Bacon's appeal of California Public Employees' Retirement System's decision regarding his final compensation is granted. California Public Employees' Retirement System shall include the "Special Salary Adjustment," reached pursuant to the settlement agreement, in Timothy Bacon's final compensation calculation.

DATED: October 22, 2015

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings

PROPOSED DECISION FOR DARRYL HURT

ATTACHMENT A

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Calculation of Final Compensation of: DARRYL HURT, Respondent, and CITY OF RIVERSIDE, Respondent.	Case No. 2012 0190 OAH No. 2014090777

PROPOSED DECISION

Mary Agnes Matyszewski, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on May 28, 2015.

Preet Kaur, Staff Attorney, represented petitioner Renee Ostrander, Acting Division Chief, Customer Account Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS), State of California.

Joseph N. Bolander, of Gaspard, Castillo, Harper, APC, represented respondent Darryl Hurt who was present throughout the hearing.

Neil Okazaki, Deputy City Attorney, represented respondent City of Riverside.

On January 22, 2015, this matter was consolidated with the case entitled, *In the Matter of the Calculation of Final Compensation of: Timothy Bacon,* OAH No. 2014090781, and these two cases were heard together. The parties' request to submit written closing arguments was granted, and the matter was submitted on September 28, 2015.[1]

[1] Mr. Hurt's closing brief was marked and received as Exhibit A. CalPERS's closing brief was marked and received as Exhibit B. The city's waiver of closing argument was marked and received as Exhibit C. The city reserved the right to respond to any rebuttal argument. CalPERS's objection to that reservation was overruled. Mr. Hurt's reply brief

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED October 23 20 15

ISSUE

Can compensation in the form of a "special salary adjustment" pursuant to a settlement agreement between Mr. Hurt and the city be included in the calculation of Mr. Hurt's final compensation?

SUMMARY

Mr. Hurt was a police lieutenant who filed a federal lawsuit against the city alleging he was wrongfully passed over for promotion to captain. Mr. Hurt resolved his litigation via a settlement agreement. The terms of the agreement provided that the city would award Mr. Hurt back pay as if he had been promoted, would pay him all salary and benefits in the future at a captain rate, would purchase service credits to allow Mr. Hurt to retire with 30 years of service, would place him on administrative leave, and later Mr. Hurt would retire. During the negotiations, the city contacted CalPERS to discuss the proposed settlement. CalPERS did not voice any concerns about it to the city.

Mr. Hurt agreed to the settlement because he would be compensated at the captain rate and that it would be factored into his retirement calculations. The city conferred with CalPERS before offering the settlement to Mr. Hurt. Thereafter, CalPERS objected to that new compensation being used in Mr. Hurt's retirement calculations. In support of its position, CalPERS relied heavily on the job titles used in the documents and the statements made when the settlement agreement was placed on the record in the underlying matter, as opposed to the clear intent of the parties. To adopt CalPERS's position would be to ignore the realities of the litigation. Mr. Hurt sued the city because he had been wrongly passed over for promotion. In the litigation he sought to be promoted to captain and/or receive captain benefits. That was the sole basis of his lawsuit.

Mr. Hurt is entitled to have his "Special Salary Adjustment" included in his final compensation calculation.

FACTUAL FINDINGS

Jurisdictional Matters

1. On September 14, 2011, CalPERS notified Mr. Hurt and the city that some of Mr. Hurt's compensation reported to CalPERS did not qualify as "compensation earnable" for purposes of determining his final compensation calculation.

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was marked and received as Exhibit D. CalPERS's reply brief was marked and received as Exhibit E. The city did not file a rebuttal brief.

Mr. Hurt and the city appealed that determination. On September 19, 2014, CalPERS filed its statement of issues, Mr. Hurt and the city filed notices of defense, and this hearing ensued.

Employment History

2. Mr. Hurt was employed as a peace officer with the city's police department for more than 25 years, until he retired in 2011. The city is a public agency contracting with CalPERS for retirement benefits for its eligible employees. By virtue of his employment, Mr. Hurt was a local safety member of CalPERS. While a peace officer, Mr. Hurt was active in the Riverside Police Administrators' Association, eventually becoming elected as its president in 2006.

Federal Litigation and Settlement Agreement

3. Because of his political activism, Mr. Hurt believed he was retaliated against at work and sued the city and several city employees in federal court for violating his rights. His lawsuit was consolidated with Mr. Bacon's federal lawsuit. That litigation was eventually settled between the parties. The settlement agreement was placed on the record, but never reduced to writing. The only documentation of the agreement is the federal court's April 12, 2010, transcript. Richard Roth, then a city attorney who represented all of the city defendants, made the following recitation on the record:

> [T]he parties have reached a settlement in this matter. And as part of the settlement, that plaintiffs Hurt and Bacon have agreed to execute a settlement agreement and general release fully releasing defendants as to all claims and containing the following essential terms, among others:
>
> 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.
>
> And both will execute and return a completed retirement application concurrent with the execution and return of the settlement agreement document.
>
> Within 30 days of receipt by the City of a fully executed original of the settlement agreement, the City will pay to Hurt and Bacon additional compensation from January 25, 2008, to today's date per the captain pay scale and during the administrative leave period provided for in a bit or before the City will ensure that both receive at least 12 months of

> compensation at the top-step captain rate prior to their retirement.
>
> Upon retirement Hurt and Bacon will be entitled to receive all benefits normally accorded retiring police officers under City policy.
>
> Prior to January 19, 2011, in the case of Lieutenant Hurt, and July 17, 2010, in the case of Lieutenant Bacon, the City will pay to them a sum sufficient to allow them to purchase additional service credits under the California Public Employees Retirement System rules and regulations in order to enable them to retire with 30 years of service.
>
> The City will place Lieutenants Hurt and Bacon 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.
>
> On or before January 19, 2011, the City will pay to Lieutenant Hurt the sum of $300,000 as non-economic damages and on or before July 17, 2010, pay to Bacon the sum of $250,000 as non-economic damages.

(Transcript, Exhibit 7, page 2, line 1 - page 3, line 15.)

The city attorney recited other terms regarding attorneys' fees and confidentiality, and the parties took a break in the proceeding to further negotiate the confidentiality provisions. (Transcript, Exhibit 7, page 3, line 16 - page 8, line 22.) At the conclusion of the additional negotiations and recitations, the federal judge asked Mr. Hurt if they reflected "the terms of the settlement as you understand them," to which he replied in the affirmative. The federal judge noted that "the settlement is not contingent upon it being successfully reduced to writing." (Transcript, Exhibit 7, page 10, lines 15-20.)

The transcript documented that although a settlement in principle was reached, it was not fully completed. When questions regarding the confidentiality provisions of agreement were raised, the federal judge said, "Well, look, it's not a time to negotiate this. I'm not going to try to sit up here and negotiate it for you. If you want to settle the case, that's fine. If you want to have an opportunity to talk with the City about it, see if you can reach some resolution, that's fine." (Transcript, Exhibit 7, page 6, lines 20-24.) The federal judge instructed the parties to work together in the future to come up with satisfactory language agreeable to both sides. In addition to leaving an impression of haste, it was clear from reading the transcript, that the settlement was not finalized, as all of the terms were not set forth, and the parties would continue having discussions when they left the courthouse. The

transcript set forth the general outline of the settlement, but not the final details, and the federal judge stated several times that the parties would be preparing final documents over the next 30 days, even going so far as to note that they were welcome to come back to court to enforce terms of the agreement, but that the lack of documentation would not derail the settlement. (Transcript, Exhibit 7, page 10, line 21 – page 11, line 13.)

CalPERS's Documents

4. Mr. Hurt's CalPERS payroll detail report from 2008 to 2010 contained entries identified as regular payroll and special compensation. The document reflected the change in Mr. Hurt's CalPERS' contributions and income following the settlement of his litigation.

5. CalPERS's Customer Touch Point (CTP) entries in 2004 and 2007 referenced inquiries by Mr. Hurt regarding purchasing service credit.

6. A May 4, 2010, CTP note indicated that Mr. Hurt "wanted to know his payrate [the city] was reporting. Reviewed his pay reporting."

7. On September 1, 2010, Mr. Hurt completed a Disability Retirement Election Application identifying his position title as "Police Lieutenant." Attached to the application was a letter from the city advising CalPERS that Mr. Hurt's work-related injuries made him incapacitated from performing his usual and customary duties as a "police lieutenant."

8. An October 27, 2010, CTP note, with the Category identified as "Retirement Estimate," stated, "Used from 1/19/2010 to 1/18/2011 as final comp period. Used special comp reported until 6/2010 since that is all which has been reported as of 10/27/10." Thus, CalPERS used Mr. Hurt's captain pay rate in its retirement calculations.

9. CTP notes in late 2010 through 2011 indicated that compensation reviews were completed.

City Documents

10. The city's October 2010 Salary Schedule noted that top-step police lieutenants earned a monthly salary of $11,563.

11. The city provided CalPERS with information regarding Mr. Hurt's salary as requested. The city advised CalPERS that Mr. Hurt's monthly salary was $14,588.54 and that his special compensation reported to CalPERS included his "salary + 9% EPMC [Employer Paid Member Contributions] as Captain."

12. In response thereto, CalPERS advised that Mr. Hurt's salary exceeded the maximum amount allowed in the top-step lieutenant category. In reply, the city provided CalPERS with the Personnel Action Form for Mr. Hurt. The form identified Mr. Hurt's job

position as "police lieutenant," and noted he received a "Special Salary Adjustment Pursuant to Settlement."

13. Mr. Hurt's payroll stubs documented earnings for regular hours and earnings for police department management. His payroll stubs also documented his withholdings and contributions, noting the sums paid towards his retirement benefits. Mr. Hurt and the city made contributions based on his captain's payrate.

CalPERS's Determination

14. In its September 14, 2011, letters to Mr. Hurt and the city, CalPERS noted that the city reported Mr. Hurt's monthly pay rate for the period July 2009 to July 2010 as follows:

> $12,603.55- 01/10 to 05/10 which equals $11,562.89 in payrate and $1,040.66 of 9% Employer Paid Member Contributions (EPMC)
>
> $14,588.49 - 06/10 to 01/11 which equals $13,383.93 in payrate and $1,204.56 of 9% EPMC.

CalPERS noted that according to the publicly available salary schedule, the maximum monthly salary allowed for a police lieutenant position was $11,563. CalPERS had reviewed the requested documentation provided by the city, including the Personnel Action Form indicating that the special salary adjustment was pursuant to a settlement agreement. Based upon its review, CalPERS determined that the city had reported compensation that did not comply with the law.

CalPERS asserted that compensation reportable must meet all the criteria as outlined in Government Code section 20636 and the regulations. CalPERS claimed that the reported earnings did not meet that criteria and requested that the city correct the reported increased monthly pay rate of $14,588.49 to the correct pay rate of $12,603.55, which included EPMC, for the June 2010 to January 2011 reporting period "in order to recover the contributions paid for this benefit." Further, CalPERS noted that Mr. Hurt's "current monthly retirement allowance has already taken this adjustment into account." CalPERS advised the city and Mr. Hurt of their right to appeal CalPERS's determination.

Witness Testimony

15. Darryl Hurt testified that he was hired as a police officer in 1982. He was promoted to sergeant 10 years later and promoted to lieutenant in 1995. Mr. Hurt testified that in January 2011 he retired as a captain, testifying, "I believed it was captain." Mr. Hurt received numerous commendations and awards during his career, including medals of valor and meritorious valor, first level awards, and personal recognitions. Mr. Hurt was involved with the Police Officers' Association and interacted frequently with the city council. Mr.

Hurt testified about his union activities, his election to president of the Association, and his contentious interactions with the police captain and city council, primarily centering on a plan to change the promotion system, which many police officers opposed. Mr. Hurt testified that the promotion to captain was originally a very informal process, but then became more formalized and was based on education, experience and an interview process with the chiefs. Mr. Hurt went through the process, was placed on the eligibility list, and believed he was passed over for promotion to captain because of his union activities. Mr. Hurt believed he was retaliated against at work and filed a federal lawsuit in 2009.

Mr. Hurt testified about the settlement agreement. After a "day-long settlement conference," the parties reached a verbal agreement that the city's attorney read into the record. A written agreement "never happened." Mr. Hurt testified that when he received a printout of the transcript, he had "questions and issues" regarding what he believed the parties had negotiated, and he emailed his attorney with his concerns. There followed an exchange of emails, with some of Mr. Hurt's concerns centering on the language in the transcript referring to him as "lieutenant" and not "captain." Mr. Hurt explained that the parties agreed that Mr. Hurt would be compensated at the captain rate with all the benefits of a captain; he received back pay at the captain's rate, and he "retired with all benefits of a captain's position."

Mr. Hurt acknowledged that, as part of the settlement agreement, he was required to retire and in return he would be paid at the higher pay rate. However, even though he was placed on administrative leave as part of the settlement, Mr. Hurt was required to perform various duties, make certain appearances, appear by telephone, and remain in contact with the department. Mr. Hurt remained in possession of his badge, his weapon, and all of his police powers. Additionally, separate and apart from the captain's pay benefits portion of the settlement, there was a damages settlement. Mr. Hurt believed that the captain's pay he received in the settlement would be factored into his retirement. His belief was based on the fact that the parties had negotiated an agreement whereby he and Mr. Bacon would receive top-step captain pay at retirement. As Mr. Hurt credibly testified, "We would not have agreed to anything else in the legal process having gone that far."

Mr. Hurt believed that the parties put the retirement term in the agreement and during the negotiations he asked about retirement with CalPERS. Mr. Hurt's attorney told him the parties were discussing that with CalPERS. During the settlement discussions, Mr. Hurt's attorney told him that CalPERS had informed the city attorney that Mr. Hurt's settlement would be structured at the captain's pay rate. It did not "stick out" to Mr. Hurt until he received a copy of the transcript and read the word "lieutenant" that he thought it should read "captain" because that was what the parties had negotiated.

Mr. Hurt testified, "I would not have accepted the settlement without assurance that the captain's pay would be part of my pension retirement." As he credibly explained, "If we had not accepted that, we'd be where we already were, [at] top-step lieutenant, and we were in court ready to go, and, if I ever thought that I was not a captain, I would not have retired when I did. I planned my retirement at the captain's pay." As he explained, one of the

remedies he and Mr. Bacon were seeking in their litigation was promotion to captain. They were paid the higher rate in exchange for settling their lawsuit, and they dismissed their lawsuit in exchange for that consideration. Based on the settlement agreement, he believed that he and Mr. Bacon were captains.

Mr. Hurt also testified that he is someone "who always does what he says he is going to do" and is upset by the fact that he believes people have backed out of the deal he thought the parties reached. During the settlement discussions, there were times when the attorneys talked by themselves, and he and Mr. Bacon were not involved in those discussions. It was his understanding that he and Mr. Bacon were negotiating for retirement at the captain's rate, and the city paid him the top-step captain pay until he retired. It was his understanding that he would retire at the top-step captain rate, and his retirement would be at that rate. He understood that the city would pay into CalPERS for those retirement benefits, and he has no evidence that the city did not do what it was supposed to do. Mr. Hurt testified about the negative fiscal impact the difference in retirement pay between a captain's pay and a lieutenant's pay has caused him and his family. Mr. Hurt testified that he was "surprised" when he received CalPERS's letter advising him that his top-step captain's pay would not be included in his retirement benefits.

Mr. Hurt testified in a straightforward and direct manner, answering all questions posed to him. His testimony was credible and persuasive.

16. Timothy Bacon was hired as a police officer in 1982. He became a sergeant in the early 1990s and made lieutenant in 1995. He retired on July 16, 2010, "as a captain." During his career he received many distinguished service awards and at least 50 commendations. He served on several task forces. While serving as a school police officer, Mr. Bacon was the only school police officer ever nominated as Riverside Police Officer of the Year. During his career, Mr. Bacon was involved in the largest murder conspiracy case in the United States, involving the investigation and arrest of 30 individuals. He created the gang unit and other units within the department.

Mr. Bacon was elected as an officer in the Association. Because of their political activities with the union, he and Mr. Hurt were targeted at work. Due to this employment retaliation, Mr. Bacon filed a federal lawsuit that was consolidated with the one filed by Mr. Hurt. There was one settlement for him and Mr. Hurt; there were not separate settlement agreements. Mr. Bacon testified that the city attorney placed the settlement agreement on the record "moments after approval from the city and our attorney that we'd be made top-step captains with back pay." Mr. Bacon testified that the agreement happened "quickly" and "got approval." He testified that the city "met our terms with the approval of CalPERS and [the agreement] went through." Although verbally stated in court, Mr. Bacon thought the agreement would be reduced to writing.

During questioning at this hearing, Mr. Bacon asked if he could dispense with the direct examination format and just describe what happened at federal court. His request was granted. Mr. Bacon testified that "in a nutshell" when he went into chambers with the

federal judge, everyone in the room was afraid of the federal judge, but he looked the federal judge square in the face, pointed to the federal judge's eagle emblem, and told him, "That eagle means something to me. It means something to [Mr. Hurt]. I love that bald black guy [Mr. Hurt]." The federal judge sat back in his chair and asked Mr. Bacon what he wanted. Mr. Bacon told the federal judge that he wanted "top-step captain," that he knew the city was going to want him and Mr. Hurt to retire, that he wanted back pay at the captain's rate, and that he wanted $250,000. He then left chambers, and Mr. Hurt was brought in with his attorney to separately discuss his settlement request.

Mr. Bacon testified credibly that, "This was huge. I have young kids, I loved what I did, I worked hard to get to that point in my career." Mr. Bacon testified. "We had a great case. I loved the city of Riverside, but it was a case of right or wrong." Further, "We had a great case, not a good case, a great case." He "absolutely" believed that they could have gotten more if they had gone to trial.

Mr. Bacon testified that, pursuant to the settlement, he would receive back pay to the date when he should have been promoted to captain, that he would receive top-step captain pay for a captain with 30 years of service even though he only had 27 and one-half years of service, that "the city would pay money to CalPERS" to increase his service credit to 30 years, and that he would receive the top-step captain's wage. Mr. Bacon testified that he wanted to retire at the top-step captain rate with 30 years' service credit. As part of the settlement, he and Mr. Hurt had to go to the CalPERS office "expeditiously" to fill out their retirement applications because Mr. Hurt was approaching his 50th birthday before Mr. Bacon. Additionally, per the settlement agreement, Mr. Bacon would receive $250,000 in damages. Mr. Bacon testified that the rank of captain was separate from the $250,000 damages because that money was being paid "in order for us to right our wrong;" it had nothing to do with the top-step captain's pay.

Mr. Bacon testified that he believed his captain pay would be part of his retirement because this is what he was told by the city attorney and his personal attorney. He was told that the agreement was "good to go" and that everybody had accepted it. Mr. Bacon testified that his and Mr. Hurt's attorneys were in the hallway, and they were elated; he and Mr. Hurt got pulled into a separate room and were told that "this is happening." The two attorneys told him and Mr. Hurt that, "All is good, we got approval, we're good to go." Mr. Bacon testified that all the attorneys were pretty elated that the settlement had been reached, but he was shocked that his career was going to possibly come to an end, it was "very surreal" for him. Mr. Bacon would have continued working if he had not been guaranteed the captain's retirement because he loved what he was doing.

When they were in chambers, Mr. Bacon told the federal judge, "I am not stupid; I know the city will want us to retire." As he predicted, the agreement required him to be placed on administrative leave and retire. Mr. Bacon had never been placed on administrative leave before, so was not familiar with it; he was discussing retirement during the negotiations. Mr. Bacon testified that he would have loved to have returned to work, make an impact, and serve his community. Mr. Bacon performed services while on

administrative leave. Most significantly, he was involved in police efforts to oppose the release of a convicted murderer on parole.

Mr. Bacon testified credibly that he would not have accepted the settlement agreement unless he knew CalPERS had agreed to it. He would have gone to trial. As he testified, "I would not have accepted the settlement unless I believed the pension benefits would be at the captain pay rate; absolutely not." Mr. Bacon testified that he would not have retired unless he believed he was retiring at the captain's pay rate. Mr. Bacon testified that to this day he gets addressed as "captain" by his troops and current captains and that he "walked out of there [the department] as a captain." Moreover, as he passionately testified, "I would not have sold my soul for lieutenant."

Mr. Bacon testified that he was "completely shocked" when he received CalPERS's letter advising him that "we were not going to get what we agreed to in federal court." Mr. Bacon has been "absolutely negatively affected" by receiving the lesser pension.

Mr. Bacon made a straightforward, no-nonsense, Wilford Brimley-appearing witness. He testified in a sincere manner, making direct eye contact, with a very self-assured posture, answering all questions posed to him. His testimony was powerful, credible, and persuasive.

17. State Senator Richard D. Roth, who was then a Riverside city attorney, represented the city defendants in the federal litigation. Senator Roth testified that, during the process of negotiating the settlement, he, the city's Human Resources Deputy Director, another city employee, and Supervising Deputy City Attorney Jeff Brown, conducted a conference call with CalPERS. The purpose of the conference call was to outline the proposed settlement to CalPERS. Based on that conference call, Senator Roth's understanding was that CalPERS had no objections to the settlement the city was proposing, to wit, retroactive payment at a captain's pay rate and paying the men at a captain's pay rate until they retired.

The city outlined the parameters of the settlement for CalPERS. Senator Roth testified that the litigation was "a failure to promote case," and the settlement would include back pay from the date of the alleged failure to promote. As Senator Roth explained, the officers sued, contending they should have been promoted to captain, the city acquiesced, the city agreed to settle as if the men had been promoted and received a salary at the higher pay rate, and the men would be allowed to retire at the higher pay rate. Senator Roth testified that the settlement involved a significant amount of money, back pay at the captain rate for both men, 12 months or so of upfront pay while at the top-step captain rate, and their retirements would be calculated at the top-step captain rate.

The city also discussed with CalPERS that Mr. Hurt and Mr. Bacon would be on administrative leave for at least 12 months, and they would receive captain's pay at the top-step pay while on administrative leave. Following that administrative leave, at two different points in time, the men would retire because they were on two different time frames: Mr.

Hunt would retire in July 2011, and Mr. Bacon in July 2010, or thereabouts, and they would retire at the captain payrate.

Senator Roth participated in the conference call with CalPERS because he wanted to make sure that when he was proposing the settlement, that it was one that would work. Although Senator Roth is not a CalPERS expert, he "wanted to have some comfort level" that he was proposing something that would work. The reason for his call to CalPERS was to discuss what he would be proposing in federal court. Senator Roth testified that he did not want to be in a position of proposing something that would not work. Based upon what he heard during the telephone conference, he believed the proposal would work. It was Senator Roth's understanding, following that telephone conference with CalPERS, that the proposed settlement was acceptable to CalPERS: Mr. Hurt and Mr. Bacon would be permitted to retire as if they were captains; their retirement would be based on the captain pay rate; they would receive back pay at the captain's pay rate; and they would receive captain pay while on administrative leave.

Senator Roth acknowledged that he was not familiar with CalPERS's processes. He did not know one way or the other if the conference call constituted a "final determination" or if any more work was required to effectuate the matter with CalPERS. He was not aware of any written confirmation from CalPERS regarding the settlement. However, as Senator Roth credibly and persuasively testified, he needs to have credibility with the court, his colleagues, and the parties, and he would never want to propose something in federal district court that would not work. Senator Roth assumed that, if there was a problem with the city's proposed settlement, it would have been identified to him during the conference call with CalPERS. There was no objection to that proposal raised during the conference call, so Senator Roth felt comfortable proposing the settlement in federal court.

After that conference call, Senator Roth told Mr. Hurt's and Mr. Bacon's attorneys that the men would be retired at the captain's pay. Senator Roth told Mr. Hurt's and Mr. Bacon's attorneys what the city was proposing, namely, the city would pay damages, place the men on administrative leave and retire them and pay them at the captain's pay rate. Senator Roth recalled telling the attorneys that they needed to verify the city's proposal with CalPERS if they had any questions.

Senator Roth testified that he "did not really touch on the retirement," and did not go into details about the retirement when he placed the settlement on the record because that was "a little bit outside of the purview of what we are doing." It was "outside of the purview" of the agreement. By that he means that the settlement would require the officers to retire on certain dates but that would require work on their part - they would have to file retirement applications with CalPERS, and this was a process outside of the federal court proceeding. Senator Roth testified that the retirement consequences of the payments were not discussed in the federal court minutes.

After leaving court, Senator Roth reduced the agreement to writing and circulated a draft to the attorneys, but there was disagreement regarding the nature and extent of the

confidentiality provision, so a written settlement agreement was never executed. When the parties could not agree on the confidentiality terms, Senator Roth decided to rely on the transcript and stated, "Frankly the judge made that clear in the transcript that that would be the case." Thus, the parties were left with what was embodied in the printed transcript.

Mr. Bacon testified after Senator Roth and completely agreed with Senator Roth's testimony. Mr. Bacon stated that Senator Roth's testimony accurately reflected the settlement discussions that took place in federal court.

18. Samuel Kamacho, CalPERS Retirement Program Specialist II, whose duties include reviewing compensation reported, testified about CalPERS's determination of Mr. Bacon's final compensation. Mr. Kamacho was not the analyst who initially worked on this matter, but was called upon to testify in this proceeding. Mr. Kamacho was not involved with the conference call with the city officials and has never spoken with Senator Roth or any city officials about the settlement.

Mr. Kamacho explained the categories CalPERS considers to determine compensation earnable. Government Code section 20636 provides two parts to compensation earnable: pay rate (the monthly base pay given to similarly situated groups of employees pursuant to a publicly available pay scale) and special compensation (earnings based on knowledge, special skills, training, work hours, etc.). CalPERS uses the group or class an employee is placed in by the public agency to determine the payrate for the employee using the public agency's publicly available pay scale, as well as labor agreements and labor policies that have been approved by the public agency's governing body.

Mr. Kamacho testified that it is "very common" for CalPERS to determine that compensation reported does not qualify as final compensation. CalPERS is required to analyze the earnings reported to ensure that the compensation is funded and that there are no compliance issues. CalPERS is trying to curb pension spiking and make sure that agencies comply with the Government Code that defines final compensation and compensation earnable. CalPERS must ensure that it and the public agencies comply with the law, and adjustments to final compensation can be made even after members retire.

Mr. Kamacho testified about the reasons Mr. Bacon's reported income did not qualify as compensation earnable: the higher pay rate was for the last few months of employment; it was paid in anticipation of retirement/separation from employment; Mr. Bacon was a police lieutenant, and his reported income exceeded the publicly available pay schedule for lieutenants; his settlement was for one person, not a group or class; he identified his position title as lieutenant on his CalPERS retirement application form; and nothing in the CTP documented that CalPERS advised the city that the settlement proposal was acceptable.

Mr. Kamacho acknowledged that all of the city's contributions were made at the captain pay rate. However, this could still create an unfunded liability because CalPERS does not just use the contributions information when making its decisions; it also considers

whether the pay rate increases are anticipated, whether they are pursuant to publicly available payrate schedules, and whether all employees are getting the same increases.

Mr. Kamacho acknowledged that if the city's Personnel Action Form stated that Mr. Bacon was a "captain" that would change his opinion. Instead, that document identified his job position as "lieutenant" and gave him the higher pay as a "Special Salary Adjustment Pursuant to Settlement." As Mr. Kamacho understood the settlement, the officers were going to retire and receive a payrate increase in exchange for that retirement. Mr. Kamacho admitted that the Government Code does not require that employees be placed in their job positions by promotion only. He admitted there are no restrictions as to how employees obtain their job titles; CalPERS does not tell employers how to conduct promotions. Mr. Kamacho also admitted that the absence of a CTP note did not establish that the conference call did not take place, acknowledging that there are times when things are not documented in the CTP. Mr. Kamacho had no reason to believe that Senator Roth was lying and did not dispute that a telephone conference took place.

Mr. Kamacho testified that public agencies contact CalPERS personnel directly "all the time" requesting information on how to report compensation. However, in these conversations, CalPERS is not making a "final determination," so it is not bound by those conversations, although "hopefully [CalPERS] is giving the correct responses" to the inquiring public agency. Mr. Kamacho testified that "a phone call or e-mail is not a 'final determination' in any sense." When asked whether he thought it was fair to assume that discussions after the telephone call were final, Mr. Kamacho testified that he did not know what the city understood following that conference call. However, Mr. Kamacho agreed that it is not unreasonable for a public agency to rely on the information given by CalPERS "in this complex area of law." When asked whether he thought an employer would act in accordance with the advice given by CalPERS, Mr. Kamacho replied, "If they believe we are giving accurate information, they would take our information as correct and act accordingly." However he testified that it is a "common understanding" that information given this way is just informational, "it is not the be-all and end-all." Moreover he was "pretty sure" that incorrect information has been given out, and was "pretty sure" he himself had given out wrong information. When asked what legal recourse a member had if an employer acted on that incorrect advice to the members' detriment, Mr. Kamacho testified that there was "the appeal process."

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. An applicant for retirement benefits has the burden of proving that he is entitled to it. (*Greatorex v. Board of Administration* (1979) 91 Cal.App.3d 54).

2. In the absence of a statute to the contrary, the standard of proof is a preponderance of the evidence. (Evid. Code, § 115.)

Applicable Code Sections

3. Government Code section 20630 defines "compensation."

4. Government Code section 20636 defines "compensation earnable" as the "payrate and special compensation of the member as defined by subdivisions (b), (c), and (g) and as limited by section 21752.5."

5. Government Code section 20636, subdivision (b)(1), 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. 'Payrate,' for a member who is not in any group or class, means the monthly rate of pay or base pay of the member, paid in cash and pursuant to publicly available pay schedules, for services rendered on a full-time basis during normal working hours..."

6. Government Code section 20636, subdivision (c), provides the exclusive list of items that are considered "special compensation." Those items include payment a member receives for special skills, knowledge, abilities, or work assignment. Special compensation does not include final settlement pay, payments made for additional services rendered outside normal working hours or other payments the board has not affirmatively determined to be special compensation.

7. Government Code section 20636, subdivision (f), defines final settlement pay 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." This subdivision further states, that the "board shall promulgate regulations that delineate more specifically what constitutes final settlement pay."

8. Government Code section 20636, subdivision (g)(1), defines compensation earnable as the average monthly compensation, as determined by the board, upon the basis of the average time put in by members in the same group or class of employment and at the same rate of pay, and is composed of the payrate and special compensation of the member."

9. Government Code section 20636, subdivision (g)(2), defines payrate as "the average monthly remuneration paid in cash out of funds paid by the employer to similarly situated members of the same group or class of employment, in payment for the member's services or for time during which the member is excused from work because of . . .leave of absence."

10. Government Code section 20636, subdivision (g)(4)(G), provides that payrate and special compensation do not include final settlement pay.

Regulatory Authority

11. California Code of Regulations, title 2, section 570, provides:

> "Final settlement pay" means any pay or cash conversion of employee benefits in excess of compensation earnable, that are granted or awarded to a member in connection with or in anticipation of a separation from employment. Final settlement pay is excluded from payroll reporting to PERS, in either payrate or compensation earnable.
>
> For example, final settlement pay may consist of severance pay or so-called "golden parachutes". [sic] It may be based on accruals over a period of prior service. It is generally, but not always, paid during the 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 pay rate, conversion of special compensation to pay rate, or any other method of payroll reported to PERS.

12. California Code of Regulations, title 2, section 571, subdivision (a), exclusively identifies those items that may be included in "special compensation." Subdivision (b)(2) provides that special compensation must be "available to all members in a group or class."

Applicable Case Law

13. The court in *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.3d 1470, 1478-1479, summarized the general principles governing determination of a public employee's retirement allowance:

> Under the PERL, the determination of what benefits and items of pay constitute 'compensation' is crucial to the computation of an employee's ultimate pension benefits. The pension is calculated to equal a certain fraction of the employee's 'final compensation' which is multiplied by a fraction based on age and length of service. . . . 'Final compensation' is the 'highest average annual *compensation earnable* by a member during the three consecutive years of employment immediately preceding the effective date of his retirement' or other designated consecutive three-year period

> . . . . Both the employer and the employee are required to make contributions to the system, based on a percentage of 'compensation.'

CalPERS's Request for Official Notice

14. CalPERS filed a Request for Official Notice attaching a CalPERS decision and excerpts from city documents. The *City of Bell* decision is not controlling because it is not precedential, and its facts are distinguishable. In *Bell*, the employee's salary was not based on a publicly available pay rate. Here, the settlement agreement tied Mr. Hurt's rate of pay to the publicly available captain pay rate. Moreover, Mr. Hurt's settlement agreement was created to right a wrong, namely the wrongful passing over of Mr. Hurt for promotion. Such was not the case in *Bell*. Additionally, nothing in the attached city documents is at odds with the findings reached in this matter. Absent the title, the settlement agreement made Mr. Hurt a police captain subject to all the benefits of that position as outlined in the publicly available documents.

Equitable Estoppel

15. With regard to the well-established doctrine of equitable estoppel, "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." (*Seymour v. Oelrichs* (1909) 156 Cal. 782, 795, quoted in *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488.)

16. "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury . . . . The doctrine of equitable estoppel may be applied against the government where justice and right require it." (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305-306.) The party asserting the estoppel bears the burden of proof. (*Killian v. City and County of San Francisco* (1978) 77 Cal. App. 3d 1, 16.)

17. "The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*City of Long Beach v. Mansell, supra,* 3 Cal.3d at 496-497.)

18. However, it is generally "held that the power of a public officer cannot be expanded by application of this doctrine." (*Page v. City of Montebello* (1980) 112

Cal.App.3d 658, 667.) In other words, the doctrine may not be applied when doing so "would have the effect of granting to the state's agents the power to bind the state merely by representing that they have the power to do so." (*Ibid.*)

19. Applying the elements of equitable estoppel, the evidence established that (1) CalPERS was fully apprised of the settlement agreement; (2) CalPERS did not raise any objections to the settlement at the time it was reached and thereafter reported to CalPERS; (3) neither Mr. Hurt nor the city had any knowledge that CalPERS would not include the salary increase in Mr. Hurt's retirement calculations; and (4) Mr. Hurt relied on CalPERS's representations to his detriment, as he only agreed to the settlement because of the assurances that his salary increase would be included in his retirement calculations. Thus, CalPERS is equitably estopped from now asserting that Mr. Hurt's "Special Salary Adjustment" should not be included in his final compensation calculation.

Evaluation

20. At first blush, the settlement agreement appears to fall within the category of final settlement pay, thereby precluding it from final compensation calculations. However, a careful reading of the applicable law, the settlement agreement, and the facts surrounding the settlement demonstrate that certain terms of the settlement agreement do not fall within the definition of "final settlement pay" and qualify as compensation earnable.

This settlement was reached as the result of a failure to promote lawsuit. The goal of this type of litigation is to be promoted and/or receive the higher pay the employee should have received if he or she was not passed over for promotion. The entire basis of Mr. Hurt's litigation was that he had been wrongfully passed over for promotion. The city acknowledged that error when it settled with Mr. Hurt and paid him back pay and benefits at the captain rate and future benefits at the captain rate, including retirement. Moreover, Mr. Hurt was not immediately retired; he was placed on administrative leave. Had the 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. Moreover, the settlement was not a conversion of employee benefits, and it was not for an amount in excess of published publicly available pay rates.

The settlement satisfied the requirements of Government Code section 20636 because it gave Mr. Hurt a captain's salary, a salary identified on the publicly available pay rate; it placed him in the group of 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 increased salary given to Mr. Hurt pursuant to the settlement agreement did not constitute final settlement pay because it did not exceed compensation earnable. To find to the contrary would overlook the underlying facts of Mr. Hurt's case. He sued the city because he had been wrongfully passed over for promotion. He settled his litigation in exchange for being paid at the publicly available captain rate.

To hold otherwise would be to forever preclude CalPERS's members from the ability to sue their employers for being wrongfully passed over for promotion. Surely the Legislature did not intend to tie a public employee's hands and prevent an entire class of individuals (CalPERS members) from being able to file causes of action for failure to promote. If the Legislature did so intend that consequence, it could have affirmatively stated that in the code sections or regulations. As written, the PERL does not preclude the settlement achieved from such a lawsuit from being used in the employee's final compensation calculations in a case with facts such as the ones presented here.

The purpose behind the laws governing final settlement pay is to prevent insidious, "cigar-filled back room deals," like those reached in the City of Bell, where friends give friends golden handshakes, spiking their compensation in an attempt to increase their pensions and paying them exorbitant salaries. However, these laws surely were not intended to prevent employees from suing when they have been wrongfully passed over for promotion. For the Legislature to intend such a result requires an affirmative statement of such an intention. Nothing in the legislative history of the relevant statutes reveal such an intent.

One final note, the testimony offered by CalPERS that answers given on the telephone or in emails cannot be relied upon as they do not constitute formal final determinations was somewhat disconcerting. Here, the city had high-ranking officials participate in a conference call attempting to settle major litigation. The city relied on CalPERS's representations made during that conference call. As Senator Roth correctly alluded to, an attorney's reputation is a priceless asset, and no respectable attorney wants to make false representations to a court or offer settlement deals that are hollow and do not resolve the litigation. As Senator Roth credibly and persuasively testified, the city sought CalPERS's input in order to offer Mr. Hurt a valid deal that would be upheld and accepted by CalPERS. It was during that time, and not now after all parties have relied upon that settlement to their detriment, that CalPERS should have objected. Its failure to do so was due to no fault of Mr. Hurt or the city and cannot now be undone.

21. Even presuming that equitable estoppel does not apply, CalPERS's position is still rejected. Mr. Hurt settled his wrongful employment practices litigation by agreeing to receive retroactive pay from the date he should have been promoted to captain and receive all future pay and benefits of a captain. Contrary to the facts presented in *Molina v. Board of Administration* (2011) 200 Cal.App.4th 53, Mr. Hurt's back pay was calculated using publicly available captain pay rates, and his future pay was to be based on the publicly available captain payrate and benefits. Further, unlike Mr. Molina, Mr. Hurt continued to be employed after resolving his litigation.

Similarly, CalPERS's reliance on *Prentice v. Board of Administration* (2007) 157Cal.App.4th 983, was misplaced. In that case, the raise was offered only to Mr. Prentice, he was alone in a class of one. Here, however, the clear unambiguous language of the settlement agreement placed Mr. Hurt in the police captain class giving him the pay and benefits of a captain. He was not in a class by himself. Unlike Mr. Prentice, Mr. Hurt's

retirement benefits were not "artificially increased." They were set at the publicly available police captain rate. The settlement agreement was open, obvious, and brought to CalPERS's attention before it was offered to Mr. Hurt. It is also worth noting that, by the terms of his settlement agreement, Mr. Hurt ran the risk that if captain benefits were ever reduced or eliminated in the future, he, too, would suffer that reduction/elimination.

CalPERS defined "special compensation" contrary to the facts presented. It was established that Mr. Hurt was wrongfully passed over for promotion and was going to be paid as a captain because of his special skills, knowledge, abilities, or work assignment. The sums were not paid as final settlement pay or for additional services rendered outside Mr. Hurt's normal working hours. The salary and benefits given to Mr. Hurt were "available to all members in the group or class" of captains. Thus the increase in pay qualified as legally authorized special compensation. Finally, CalPERS's reliance on the job title used by Mr. Hurt in his retirement application, and the job title used by Senator Roth when placing the settlement on the record, was not persuasive because it put form over substance and was at odds with the clear intent of all the parties - an intent CalPERS was advised of during the conference call.

CalPERS's argument that allowing Mr. Hurt to receive these retirement benefits "will conflict with strong public interest by permitting the city to artificially increase" Mr. Hurt's benefits by providing him with compensation increases unavailable to other lieutenants overlooks the facts of this case. Namely, the city paid Mr. Hurt the captain rate as set forth in the publicly available payrate and publicly available documents. He was paid a salary paid to all other captains. Furthermore, the city informed CalPERS of the settlement agreement, sought CalPERS's input on whether it would be acceptable, and reported it to CalPERS. Thus, CalPERS' fears, on the facts presented here, are baseless.

The evidence presented established that Mr. Hurt was in the class of police captains and entitled to all benefits of police captains, including retirement benefits.

ORDER

Darryl Hurt's appeal of California Public Employees' Retirement System's decision regarding his final compensation is granted. California Public Employees' Retirement System shall include the "Special Salary Adjustment," reached pursuant to the settlement agreement, in Darryl Hurt's final compensation calculation.

DATED: October 22, 2015

MARY AGNES MATYSZEWSKI
Administrative Law Judge
Office of Administrative Hearings