

ATTACHMENT B
STAFF'S ARGUMENT

STAFF'S ARGUMENT REGARDING THE PROPOSED DECISION

In 1995, Respondent Paul Mast ("Mast") sought to increase his retirement allowance from the Judges' Retirement System ("JRS"), by threatening to widely publicize a legal theory that could expose the JRS to hundreds of millions of dollars of claims and substantial defense costs. Mast's threat worked on a former CalPERS attorney and the former JRS Manager she was advising. That former JRS Manager and Mast signed a settlement agreement under which Mast would be paid additional amounts that no other retired judge received, in exchange for his agreement to keep the settlement agreement confidential.

As a matter of law, the settlement agreement is not, and was never, enforceable. Benefits must be paid according to law. If Mast's legal theory was correct, then JRS should have paid *all* qualifying retired judges according to that theory. But, Mast's legal theory was *not* correct. The California Supreme Court had already rejected his theory in 1980. Thus, no retired judge should have ever been paid according to Mast's theory.

Mast became a member of the JRS on November 8, 1965. On January 15, 1979, he resigned from his last judicial office and elected a deferred retirement from JRS under Government Code section 75033.5. Mast became entitled to receive a monthly allowance from JRS on May 28, 1995, and JRS began paying him an allowance in compliance with Government Code section 75033.5.

Around the time that Mast became entitled to receive his retirement allowance, he began asserting that, pursuant to the California Supreme Court case *Olson v. Cory* (1980) 27 Cal.3d 532, JRS was required to pay him more than he was entitled to receive under Government Code section 75033.5. In reality, *Olson v. Cory* rejected the exact same theory that Mast claims *Olson v. Cory* accepted.

Mast first tried to convince JRS that he was the only judicial pensioner who was entitled to additional amounts under *Olson v. Cory*, based on his "unique set of circumstances." When that did not work, he then claimed that his theory applied broadly to many other retired judges and justices and he threatened to widely publicize his theory if JRS did not settle with him alone.

In an August 5, 1996 letter to counsel for JRS, Mast wrote: "What then can I give as an inducement to resolve the claim? What I can give is complete and total confidentiality. At the present time, except for my wife, no one knows that I have made this claim. I have not discussed it with friends, judges, former judges, or anyone else. As part of a settlement, I would commit to never discuss or disclose the claim or settlement with anyone." At the end of the letter he wrote:

The window of opportunity to resolve the claim is ... very short and is now. In resolving the claim, CalPERS is not acceding to my position and is not agreeing that my claim is

valid. What CalPERS is doing is recognizing the economic facts of the case and the possibility that they could lose. In effect it is like resolving a \$100,000 lawsuit for \$100. This is something that no reasonable litigator could turn down regardless of how strong he or she thought their position to be.”

Mast explained in another letter that he sent on the same day: “[M]y proposed resolution will save PERS and the State of California between 200 million and 400 million dollars ...”

Mast’s threats achieved their intended result. An October 1996 settlement agreement provided that JRS would pay Mast the additional amounts that he sought for himself and “each party [would] keep the terms of this agreement confidential.”

Years later, even though Mast was receiving amounts that no other judge received, he claimed that JRS was paying him too *little* under the settlement agreement. After writing several letters and emails to JRS to no avail, Mast ratcheted up his efforts to induce JRS to pay him more money.

On September 1, 2010, Mast wrote letters to JRS, CalPERS Board members, the State Controller and the State Attorney General, explaining that he would continue to honor the confidentiality provision in the settlement agreement, but only if JRS paid him over \$140,000 and an increased retirement allowance. If JRS did not pay him the additional amounts he sought, he threatened JRS with \$1 billion in claims from other judges.

JRS did not yield to Mast’s demands, so Mast carried through with his threats. He teamed up with attorney Jorn Rossi and solicited dozens of retired judges and justices (and heirs of deceased retired judges and justices) to pursue claims against JRS based on the same frivolous legal theory Mast had settled for himself years earlier.

The San Diego Superior Court dismissed Mast’s and Rossi’s frivolous case early in the proceedings. The Fourth District Court of Appeal unanimously affirmed the trial court’s judgment in *Staniforth v. Judges’ Retirement System* (2014) 226 Cal.App.4th 978.

Even after the Court of Appeal rejected Mast’s theory, Mast still wanted to pursue individual claims against JRS. Thus, a hearing was held on November 30, 2015 before an Administrative Law Judge (ALJ) of the Office of Administrative Hearings (OAH). Mast appeared at the hearing and represented himself. Being a retired judge, Mast fully understood the hearing process and actively pursued his interests throughout that process. He was provided all required notices and information, he presented evidence and argument at the hearing, and he filed substantial pre-hearing and post-hearing briefing with the OAH in this matter.

On February 10, 2016, the ALJ issued her Proposed Decision. The Proposed Decision correctly holds that the JRS/Mast settlement agreement was invalid and void from

inception, is not binding on the parties and should not be followed prospectively. In other words, the Proposed Decision correctly recommends that Mast's benefits should be paid in accordance with the same law that applies to every other member of JRS. With regard to this issue, the Proposed Decision is thorough and well-reasoned, and it should be adopted.

The Proposed Decision also rejects Mast's new frivolous theory that he should have been able to retire at age 60 instead of age 63, even though he had less than 20 years of service. Government Code section 75033.5 provides: "No judge shall be eligible to receive an allowance pursuant to this section until the attainment of at least age 63 unless the judge is credited with 20 years of judicial service and has attained age 60." Again, with regard to this issue, the Proposed Decision is well-reasoned and should be adopted.

With regard to the past overpayments that JRS has made to Mast under the invalid settlement agreement since 1995, the ALJ recommends that JRS abandon recovering any of those overpayments, which total approximately \$175,000 in principal alone (over \$500,000 with interest). However, the Board has broad discretion to determine whether, how much, and on what terms Mast should be required to repay those amounts to JRS. Staff recommends that even though the Board has discretion to adopt the ALJ's proposal that the JRS recover none of the overpayments, the Board should consider whether to exercise its discretion to recover some or all of those overpayments from Mast.

The Board's Broad Discretion To Recover Overpayments

Government Code section 20160(b) provides: "[T]he board shall correct all actions taken as a result of errors or omissions of the university, any contracting agency, any state agency or department, or this system."

Further, the law authorizes JRS to recover amounts that have been overpaid through offsets to JRS's ongoing benefit payments to Mast. Government Code section 20163 provides in pertinent part: "Adjustments to correct overpayment of a retirement allowance may also be made by adjusting the allowance so that the retired person or the retired person and his or her beneficiary, as the case may be, will receive the actuarial equivalent of the allowance to which the member is entitled."

In *City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, the court explained: "[W]e believe that the Board has discretion to decide whether, how and to what extent any overpayments made to [] retirees should be repayable to [the retirement system]." *Id.* at 244-45.

Conclusion

The Proposed Decision correctly recommends that the Board direct JRS to adjust Mast's monthly retirement allowance and pay him only the amount to which he is

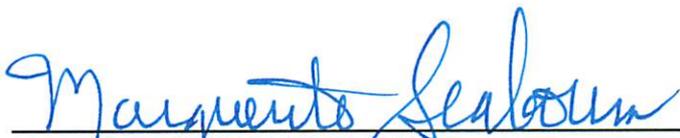
lawfully entitled. The Proposed Decision also correctly rejects Mast's frivolous theory JRS should have retired him in at age 60 instead of age 63. On these points the Proposed Decision should be adopted by this Board. Thus, staff believes that the Board should take one of two alternative actions:

- (1) If the Board believes that the JRS should not recover any of the amounts that JRS overpaid to Mast over the two decades the settlement agreement was in effect, the Board should adopt the Proposed Decision; or
- (2) If the Board would like to further consider whether it should recover from Mast some or all of the overpayments that the JRS made to him, then the Board should reject the Proposed Decision and hold its own hearing on the limited issue of the amount of the overpayment to be recovered.

Because the Proposed Decision applies the law to the salient facts of this case, and the Board has broad discretion with regard to the collection of overpayments, the risks of adopting the Proposed Decision are minimal. Mast may file a Writ Petition in Superior Court seeking to overturn the final Decision of the Board.

The risks of rejecting the Proposed Decision also are minimal, because, the Board would then have the opportunity to review the evidence and arguments and reach its own decision after conducting that review.

April 20, 2016


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