ATTACHMENT A

THE PROPOSED DECISION

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BEFORE THE
BOARD OF ADMINSTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Recalculation of Benefits of:	Case No. 2010-0825
PAUL G. MAST,	OAH No. 2015030996
Respondent.	

PROPOSED DECISION ON REMAND

This matter was heard by Julie Cabos-Owen, Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH), on November 30, 2015, in Los Angeles, California. Petitioner, the Judges' Retirement System (JRS or Petitioner) was represented by Jeffrey R. Rieger, with Reed Smith LLP. Retired judge, Paul G. Mast (Respondent) appeared at the hearing and represented himself.

Oral and documentary evidence was received. The record was left open to allow the parties to submit post-hearing briefs. JRS filed and served its Post Hearing Brief on December 18, 2015, which was marked for identification as Exhibit 33, and lodged. Respondent filed and served his Opposition to JRS's Closing Brief on January 11, 2016, which was marked for identification as Exhibit KK, and lodged. JRS filed and served its Reply to Respondent's Final Argument on January 20, 2016, which was marked for identification as Exhibit 34, and lodged. The record was closed and the matter was submitted for decision on January 26, 2016.

Remand Order

The Proposed Decision was issued on February 10, 2016. On May 9, 2016, the California Public Employees' Retirement System (CalPERS) notified OAH that on April 20, 2016, the CalPERS Board of Administration had non-adopted the Proposed Decision and remanded the case to the ALJ at OAH to take additional evidence on the issue of whether the JRS "may recover or recoup any overpayments that may have been made" to Respondent. The May 9, 2016 remand letter from CalPERS (and attached transcript excerpt from the Board of Administration meeting) was marked as Exhibit 38 and admitted.

Submission of Briefs on Remand with No Hearing; Ruling on Admission of Additional Declarations and Exhibits

Following remand, the parties participated in a May 20, 2016 telephonic trial setting conference and a July 15, 2016 telephonic status conference. The May 20, 2016 Telephonic Trial Setting Conference Order was marked as OAH 1 and admitted; the July 15, 2016 Telephonic Status Conference Order was marked as OAH 2 and admitted. The May 20, 2016 Telephonic Trial Setting Conference Order instructed JRS to lodge with OAH "the record in this matter, including the transcript of the previous administrative hearing held on November 30, 2015, all exhibits identified and/or received into evidence and any other papers that are a part of the record." (Exhibit OAH 1, para. 2.) As instructed by OAH, JRS lodged the exhibits identified and received into evidence, but did not lodge the transcript of the November 30, 2015 hearing. The May 20, 2015 Telephonic Trial Setting Conference Order also required the parties to file and serve briefs and additional documentary evidence by June 10, 2016 (for JRS) and by July 12, 2016 (for Respondent).

During the July 15, 2015 Telephonic Status Conference, the parties confirmed that they did not wish to submit any additional evidence or argument other than the evidence and argument submitted pursuant to the May 20, 2016 Telephonic Trial Setting Conference Order. Nevertheless, an August 19, 2016 hearing date was set in the event the ALJ determined that a hearing on remand was necessary.

The parties filed and served briefs and documents for consideration by the ALJ. On June 8, 2016, JRS filed a "Brief of the Judges' Retirement System on Remand," "Declaration of Jeffrey R. Rieger," and "Declaration of Pamela Montgomery." marked respectively as Exhibits 35, 36, and 37. On July 11, 2016, Respondent filed a "Respondent's Reply Brief," marked as Exhibit LL; and "Declaration of Paul Mast," marked as Exhibit MM.

On August 10, 2016, the ALJ Issued an Order Vacating the August 19, 2016 hearing date. However, Respondent was allowed to file and serve any objections to Exhibits 36 and/or 37, and Complainant was allowed to file and serve any objections to Exhibit MM. The ALJ ordered that any written objections be filed and served by close of business August 26, 2016. The August 10, 2016 Order Vacating the August 19, 2016 Hearing Date was marked as Exhibit OAH 3 and admitted.

Neither party filed any written objections to the evidence submitted on remand. There being no objection, Complainant's Exhibits 36 and 37 and Respondent's Exhibit MM were admitted into evidence. The record on remand was closed on August 26, 2016.

The additional documents provided the ALJ with evidence which was lacking in the prior hearing. While the majority of the factual findings of the original proposed decision, which were established through testimony and documentary evidence at the November 30, 2015 hearing,

remain unchanged, some factual findings and legal conclusions have been revised and added regarding the issue on remand. (See Factual Findings 32(c), 33(a) through 33(f), and 34(a), and Legal Conclusions 11(a), 11(b), 13(d) through 13(g), 16(b), 17(b), and 17(c).) However, these revised/added facts and conclusions do not change the ultimate conclusion previously made regarding whether the JRS may recover or recoup any overpayments that may have been made to Respondent.

FACTUAL FINDINGS

1. JRS filed the Statement of Issues in its official capacity.

2. The California Public Employees' Retirement System (CalPERS) administers the JRS in accordance with the Judge's Retirement Law, Government Code sections 75000, et seq.

3. Respondent became a member of JRS on November 8, 1965, following his appointment to the Municipal Court of the State of California. He took his last oath of office on January 6, 1975.

4. On January 15, 1979, Respondent retired from his last judicial office, and he elected a deferred retirement from JRS under Government Code section 75033.5. At the time he left his last judicial office, he was credited with just over 13 years of judicial service.

5(a). At all relevant times, Government Code section 75033.5 has provided that a retired judge's retirement allowance will be "an annual amount equal to 3.75 percent of the compensation payable at the time payments of the allowance fall due, to the judge holding the office which the retired judge last held prior to his or her discontinuance of his or her service as a judge, multiplied by the number of years and fractions of years of service with which [Respondent] is entitled to be credited at the time of his or her retirement, not to exceed 20 years."

5(b). Government Code section 75033.5 essentially ties the retirement allowances of judges to the current salaries of judges. Thus, the formula for calculating a retired judge's allowance would be: (3.75 percent) x (retiree's years of service) x (salary of a current judge holding the same office as the retiree held).

6. In 1969, when Respondent was still on the bench, Government Code section 68203 provided for judicial salaries to include annual cost of living increases as determined by the California Consumer Price Index (CPI). However, in 1976, Government Code section 68203 was amended, effective January 1, 1977, to cap the judges' annual salary cost of living increases to five percent.

7(a). Several judges challenged the constitutionality of the amendment to Government Code section 68203. In 1980, the California Supreme Court, in *Olson v. Cory* (1980) 27 Cal.3d 532 (*Olson*), held that the amendment to Government Code section 68203 was unconstitutional as applied sitting judges who began their terms during a specified time period prior to January 1, 1977 (the "protected period") and as applied to retired judges whose retirement allowances were calculated based on the salaries of those sitting judges. However, the *Olson* Court also held the statute was not unconstitutional as applied to judges who began new terms after January 1, 1977.

7(b). Regarding the rights of sitting judges to pre-amendment salary increases, the *Olson* Court noted:

> Prior to the 1976 amendment, judges had a vested right not only to their office for a certain term but also to an annual increases in salary equal to the full increase in the CPI during the prior calendar year. With the 1976 amendment the state purported to withdraw that right unilaterally thus impairing a vested interest. [¶] . . . [¶]
>
> A judge entering office is deemed to do so in consideration of . . . salary benefits then offered by the state for that office. If salary benefits are diminished by the Legislature during a judge's term, or during the unexpired term of a predecessor judge . . ., the judge is nevertheless entitled to the contracted-for benefits during the remainder of such term. The right to such benefit accrues to a judge who served during the period beginning 1 January 1970 to 1 January 1977, whether his term of office commenced prior to or during that time period. "An employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure. [Citation omitted.]." [¶] . . . [¶]
>
> Thus, while a judge is entitled to a salary based on unmodified Government Code section 68203 throughout a term ending, for instance, in 1978, his salary for a new term beginning on or after the effective date of the 1976 amendment – 1 January 1977 – will be governed by the statute as amended. Likewise, a judge entering office for the first time on or after 1 January 1977, including a judge entering upon his own term or upon the unexpired term of a predecessor judge, cannot claim any benefit based on section 68203 before the 1976 amendment.

(27 Cal.3d 532, 538-540.)

7(c). Regarding the rights of retired judges to pre-amendment salary increases, the *Olson* Court noted:

> The 1976 amendment, in addition to impairing the vested rights of judges in office, also impairs those of judicial pensioners. [¶] . . . [¶]
>
> Contractually, each judicial pensioner is entitled to some fixed percentage of the salary payable to the judge holding the particular judicial office to which the retired . . . judge was last elected or appointed. . . . Accordingly, a judicial pensioner cannot claim impairment of a vested right arising out of the 1976 amendment except when the judge holding the particular judicial office could also claim such an impairment. The resolution of pensioner vested rights, then, is dependent on the foregoing resolution of judges' vested rights left unimpaired by the 1976 amendment. [¶] . . . [¶]
>
> [I]t is not necessary for our purposes to determine a judicial pensioner's right as being vested. Vested or not, a pensioner's right entitles him or her to benefits based on the prevailing salary for the judge or justice occupying the particular judicial office, regardless of the date of termination of judicial services giving rise to the pension. Finally, as in the case of judges or justices who enter upon a new or unexpired term of a predecessor judge after 31 December 1976, benefits or judicial pension[s] based on the salaries of such judges will be governed by the 1976 amendment.

(*Id.* at 540-542.)

7(d). In conclusion, the *Olson* Court held:

> We conclude that Government Code section 68203 as amended in 1976, insofar as it would limit cost-of-living salary increases as provided by section 68203 before the 1976 amendment, cannot be constitutionally applied to (1) a judge or justice during any term of office, or unexpired term of office of a predecessor, if the judge or justice served some portion thereof (a "protected term") prior to 1 January 1977, and (2) a judicial pensioner whose benefits are based on some proportionate amount of the salary of the judge or justice occupying that office. [¶] . . . [¶]
>
> A judge or justice who completes a protected term and voluntarily embarks upon a new term can no longer claim to serve in a protected

> term, and his or her compensation will thereafter be governed by the provisions of section 68203 as amended in 1976. . . . Thus the salary at which any unprotected term is commenced – including the salary of a judge or justice leaving a protected and embarking upon an unprotected term – is the statutory salary then paid to judges or justices of equal rank who never served during a protected term. Although a salary of a judge or justice serving a protected term will be decreased upon entering a new term, such a result is constitutionally permissible as such a judge or justice has voluntarily embarked or will voluntarily embark upon a new term for which there was or is a legislatively designated compensation.

(*Id.* at 546-548.)

8. Pursuant to the *Olson* decision, judges whose terms began during the protected period were entitled to cost of living increases as determined by the California CPI until they took their next oath of office after January 1, 1977. Additionally, any pensioner whose allowance was tied to the salaries of those judges would also be entitled to cost of living increases as determined by the California CPI until the judges to whose salaries they were tied were not entitled to such increases.

9(a). Since Respondent began his last judicial term during the protected period, pursuant to *Olson* and as specified by Government Code section 68203, Respondent was entitled to receive annual cost of living increases determined by the California CPI until he left the bench in 1979.

9(b). In accordance with *Olson*, Respondent received retroactive salary increase payments in the early 1980's.

10(a). Respondent was entitled to receive a monthly retirement allowance from JRS beginning May 28, 1995.

10(b). At the administrative hearing Respondent contended that the JRS failed to inform him that he was entitled to receive a retirement allowance at age 60 (i.e. in 1992). However, Government Code section 75033.5, which governs the formula for Respondent's deferred retirement benefits (see Factual Findings 4 and 5), states in pertinent part, "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." Consequently, the JRS correctly informed Respondent that he was eligible to receive his retirement allowance in 1995 at age 63. Respondent acknowledged this in a March 27, 1995 letter to the JRS, stating, "The purpose of this letter is to advise you that I will reach my Sixty-third birthday on May 28, 1995. My benefits should begin at that time." (Exhibit 5.)

11. At the time Respondent began receiving a retirement allowance (1995). the

Olson holding had no impact on his rights as a judicial pensioner since his allowance should have been calculated based on the salary of a currently sitting judge, as set forth in Government Code section 75033.5. However, Respondent disputed the amount of his retirement allowance, asserting that pursuant to *Olson*, his retirement allowance should not be based on the salary benchmark of a current judge holding the same office as he held. Instead, Respondent asserted that his retirement rights had "vested" under Government Code section 68023 and that *Olson* required JRS to apply annual cost of living increases to Respondent's own last judicial salary to set the salary benchmark for calculating his retirement allowance. Essentially, Respondent claimed that his allowance should be based on his hypothetical salary had he continued on the bench and received cost of living increases without the five percent cap. Thus, Respondent was asserting that the formula for calculating his retirement allowance should be (3.75 percent) x (years of service) x (Respondent's last salary, increased annually by the CPI cost of living percentage).

12(a). JRS denied Respondent's request to modify his retirement allowance. Respondent filed an appeal of the JRS denial, and Case Number L9605311 was opened with the Office of Administrative Hearings (prior OAH case).

12(b). CalPERS filed a Statement of Issues in the prior OAH case which specified the correct formula for calculating Respondent's retirement allowance under Government Code section 75033.5 (using the salary of the currently sitting judge, not Respondent's own last salary with cost of living increases). CalPERS's Statement of Issues in the prior OAH case also articulated the correct interpretation of *Olson*.

12(c). Respondent filed his Response to Statement of Issues in the prior OAH case, asserting his interpretation of *Olson*.

13(a). In 1996, during the pendency of the prior OAH case, Respondent sent letters to Maureen Reilly, Senior Staff Counsel with CalPERS, insisting that his interpretation of *Olson* was correct.

13(b). In an August 5, 1996 letter, Respondent noted the following:

> As you very cogently pointed out in our telephone conversation, the only way to resolve this matter is for CalPERS to change their position on the claim. 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.

[¶] . . . [¶]

If the claim goes to hearing and decision with [OAH], one of two things will happen, neither of which will be in the best interests of CalPERS or the State of California. If I win the decision, the decision will be a matter of public knowledge; a copy will be sent to the other respondent, my former court; and the personnel of the OAH will be aware of the decision. Although I have no intent of publicizing any such decision, through one of the other sources, some lawyer or lawyers will undoubtedly become aware of the decision and of the need to pursue the rights of the other judges, widows of judges, and estates of judges who retired during the requisite time period.

If I lose at the hearing, I will be forced to take the matter to the appropriate court, which will have the same effect in regard to public knowledge and further claims as if I win at the hearing.

The window of opportunity to resolve the claim is therefore 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.

(Exhibit 7.)

13(c). In another August 5, 1996 letter, Respondent stated:

After researching the question again, and reading your Statement of Issues and your authorities, it is clear to me that my position is absolutely correct. If you put on your hat as advisor to PERS, instead of an advocate in opposition to my position, I am certain that you will agree with me.

In view of the fact that my proposed resolution will save PERS and the State of California between 200 million dollars and 400 million dollars, I cannot understand why I have not heard from you before this time. . . .

(Exhibit 8.)

13(d). On September 20, 1996, Ms. Reilly sent Respondent a letter stating, "This is to

confirm in writing that the [JRS] has accepted the terms of your settlement offer as outlined in your letter of August 5, 1996. I will shortly draft a Settlement Agreement with a confidentiality clause for your review and signature. [¶] In the meantime, since we have settled in principle. JRS will cancel the hearing now scheduled for October 3, 1996." (Exhibit O.)

14(a). In October 1996, the JRS and Respondent entered into a settlement agreement in the prior OAH case in lieu of proceeding to hearing to resolve their dispute. The agreement was signed by Respondent and "Michael Priebe, Manager" of the JRS.

14(b). The settlement agreement specified:

> The parties to this agreement, the [JRS and Respondent], hereby fully settle their dispute over his request to re-calculate his retirement allowance. The parties agree to the following terms:
>
> 1. It is not disputed that JRS must follow the formula for deferred retirements in Government Code section 75033.5.
>
> 2. Using that formula, JRS will re-calculate [Respondent's] allowance based on the definition in former Government Code section 68203, as in effect on January 6, 1975, the date his last term began, and based on the compensation he was entitled to on the date of his retirement, January 15, 1979, pursuant to *Olson v. Cory* (1980) 27 Cal.3d 532.
>
> 3. Said recalculated retirement allowance shall begin on the date that [Respondent] became eligible to receive a retirement allowance, May 28, 1995.
>
> 4. [Respondent] expressly waives his right to appeal this matter further to JRS or any other competent jurisdiction.
>
> 5. Each party will keep the terms of this agreement confidential.
>
> 6. Each party will bear their own costs in negotiating the terms of this agreement.
>
> In settling, the parties do not admit any wrongdoing or breach of contractual obligations. The parties are settling this matter solely to avoid the expense and uncertainty of litigation.
>
> By signatures below, JRS and [Respondent] agree to enter this

settlement agreement as a legally binding contract . . .

(Exhibit 1.)

15(a). According to the settlement agreement, JRS would calculate Respondent's retirement allowance using the formula set forth in Government Code section 75033.5, except that the multiplier (3.75 x years of judicial service) would be applied to a different benchmark salary than that specified in section 75033.5. The benchmark salary specified in the settlement agreement was the hypothetical salary to which Respondent would have been entitled had he continued serving on the bench until May of 1995, with no cap on annual cost of living increases. The starting salary to which the annual cost of living increases were applied in order to reach the benchmark was the salary to which Respondent was entitled, under *Olson*, on January 15, 1979. Thus, the formula for calculating Respondent's retirement allowance was (3.75 percent x 13 years, 2 months, 8 days of judicial service) x (Respondent's required salary on January 15, 1979, increased annually by California CPI cost of living percentage).

15(b). As set forth in the settlement agreement, the cost of living increases were to be determined under former Government Code section 68203 (prior to the 1976 amendment). That statute provided, in pertinent part:

> [O]n September 1 of each year thereafter the salary of each justice and judge . . . shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year.

15(c). Essentially, the settlement agreement obligated JRS to pay Respondent a retirement allowance calculated according to Respondent's interpretation of *Olson*.

15(d). Respondent's interpretation of *Olson* was incorrect, and the retirement allowance to which the parties agreed was not required by the holding in *Olson*. (See also Factual Finding 34.)

16. In July 1997, JRS began making cost of living adjustments to Respondent's retirement allowance. In letters to Respondent in July 1997, March 1998, April 1999, and February 2000, JRS specified the amount of Respondent's cost of living increases and the adjusted monthly retirement allowances, effective January 1 of each year. In those letters, JRS noted, "As you know, you are the only retired judge who is getting an annual cost-of-living adjustment." (Exhibits P and S.)

17. In about 2002, following staff changes at JRS, Respondent noted that his

retirement allowances were not being calculated in the same manner as prior allowances, and he asserted that they did not comport with the settlement agreement.

18. At some point, Pamela Montgomery, a CalPERS Staff Services Manager II responsible for administration of the JRS became involved with Respondent's case, and correspondence between the two began in about 2006.

19. On May 10, 2006, Respondent sent a letter to Ms. Montgomery, apparently in response to her letter of April 21, 2006, wherein Respondent stated, "Your letter and the accompanying calculations are completely erroneous. . . ." (Exhibit 11.) Respondent contended that Ms. Montgomery had misread the law in maintaining that the cost of living amount from September is to begin the following September. He insisted that "the reason September was chosen was to give the state time to implement the increase for the following year - that is January. The increases from September are implemented three months later in January." (*Ibid.*)

20(a). Respondent reiterated these points in June 11, 2006 correspondence, and he also pointed out:

> The Cost of Living Adjustment table you used is wrong. You used the Department of Labor table for the Bay area. The table used by your office in 1996, and the one referred to in your letter is the California Department of Industrial Relations table, which is the California Consumer Price Index, and is the weighted average for the three major metropolitan areas in California, and which is based on the U.S. Department of Labor figures. . . .

(Exhibit 12.)

20(b). Respondent also noted in response to Ms. Montgomery's purported assertion that the parties needed to recalculate the starting salary amount:

> At the time of the settlement, your office did all the calculations without participation by me. Right or wrong, I accepted them without question. Upon my accepting them, as part of the settlement, those figures became set in stone and were the basis from which all future adjustments were to be made. Neither you nor I can go back before October 8, 1996 and change things. The starting point must be the amount set by the settlement.

(*Ibid.*)

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20(c). Respondent further noted:

> I agreed to a confidentiality clause prohibiting me from disclosing the settlement. I have lived up to this. You will note that I called this to the attention of your office when nothing was done to provide the figures that you just provided to me. At that time I suggested you were in breach of the agreement and therefore the confidentiality clause was abrogated. . . .

(*Ibid.*)

21(a). On August 3, 2007, Respondent sent an email to Ms. Montogmery, noting that

> It is getting on towards a year since I sent you the corrected accounting regarding the payment deficiencies on my pension. I know that this is a burdensome project for you. . . . [¶] The accounting I sent you last year is correct, and I tried to assist you by projecting the results forward to the end of 2006. Unfortunately, that has long past, and it has gotten more complex as another adjustment time has come and gone.

(Exhibit 13.)

21(b). Respondent requested that Ms. Montgomery review his accounting and "bring this matter up to date." (*Ibid.*)

22. In November and December 2007, Respondent again emailed Ms. Montgomery asking her to help him conclude the calculation dispute. On December 7, 2007, Ms. Montgomery sent Respondent an email stating:

> As I explained in my previous email, we have not been able to validate that your calculations are correct. [¶] You may need to review the CCPI used in you calculations. Government Code section 68203, as in effect on January 6, 1975, provided that on September 1 of each year the (judges) salary is increased based on the CCPI from the previous year. That would be the annual CCPI for the previous calendar year, not the CCPI in September of the year of the adjustment. This may be where some of the discrepancy exists between our calculations and your calculations. In the meantime, I am attempting to obtain assistance from our actuarial staff to review both sets of calculations.

(Exhibit J.)

23. In March 2008, Respondent again emailed Ms. Montgomery seeking resolution of the dispute regarding calculation of the cost of living adjustment and asking Ms. Montgomery have her auditor contact him. Respondent again pointed out that he had agreed

to keep the settlement agreement terms confidential and noted:

> [A]lthough the actions of your office has [*sic*] probably relieved me of any obligation on the confidentiality agreement, I am not a crusader, and I do not intend to do anything about it. I am not threatening anything, merely trying to put things into context, as there is a feeling I get that you feel that I am getting something that I am not entitled to. What is the truth is that I am receiving only what I am entitled to, and it is others who have been deprived of what they rightfully are entitled to.

(Exhibit 14.)

24. As of April 2008, JRS staff members were still unable to determine how to calculate Respondent's cost of living increases using the *Olson* case and former Government Code section 68203. Staff member Gale Patrick noted in an email to Ms. Montgomery that the reference in Government Code section 68203 to the California CPI as compiled and reported by the California Department of Industrial Relations was "vague as it does not specifically define which index table to use." (Exhibit L.) Patrick noted that "The California Department of Industrial Relations issues two California tables, the California All Urban Consumers Index (CPI-U) and the California Urban Wage Earners and Clerical Workers Index (CPI-W)." (*Id.*) Patrick also noted that the controller in the *Olson* case had used the CPI-W index table and a December-to-December basis for determining the calendar year. Patrick noted "In summary, I think you need to get [Respondent] to 'buyoff' on the California CPI-W index basis, and the December to December basis if one tries to follow Controller Cory's schedule, unless the basis was changed at a later date before any further calculations are done." (*Ibid.*)

25. On May 7, 2008, Respondent sent an email to Ms. Montgomery noting:

> [I have] been patient for the four years since your office failed to make the required adjustments, and doubly patient in the one and a half years since I did a complete accounting and gave you a summary of what was owed and what the adjustments should have been. [¶] I have finally run out of patience. Unless I receive the funds that are due for the past years, and the adjustment of the current pension payment amount by the beginning of June, I will take further action. I have not decided what action I will take, as I have several alternatives, none of which I wish to take. . . .

(Exhibit 15.)

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26. On January 27, 2009, Ms. Montgomery instructed JRS staff member Mark

Chiu in an email. "At this time, do not make a [cost of living] adjustment for [Respondent]." (Exhibit T.)

27. On September 1, 2010, Respondent sent Ms. Montgomery a letter stating, "I have your letter of August 9, 2010 written in response to my many communications with you. Again your calculations are erroneous. . . . Computation of my retirement benefits was resolved in 1996 when the [JRS] and I entered into a Settlement Agreement. . . ." (Exhibit U.) Apparently in response to an assertion by Ms. Montgomery, Respondent noted that Government Code section 20160, subdivision (b), does not apply, in that "no error was made" and that section 20160 applies to clerical errors and not the settlement of litigation via a written settlement agreement. Respondent also pointed out:

> [The settlement agreement] does not say that the calculation made may be modified in the future by another calculation. It says that the calculation made by JRS at that time is that which will be used as the basis for the retirement allowance. [¶] It should also be noted that I took no part in the calculations. I was not contacted or consulted and had no input into it. I relied on JRS to do it correctly and they did. I was not privy to the worksheets. . . . [¶] The Settlement Agreement was drafted by JRS, either by staff or by counsel. I took no part in its drafting or preparation. Although I do not see any ambiguities, any such that there may be would be construed in my favor and against you, according to law. [¶] The validity or finality of the Settlement Agreement is not affected by any subsequent satisfaction you may have with how it was drafted. . . . I have been writing to you and your predecessor for ten years to have you calculate my retirement benefits correctly. The time is up. If the Retirement System does not pay the amount due and adjust the amount payable each moth by the October 1 payment, I will submit it to an attorney. I cannot wait another four years for another response. I also cannot wait indefinitely and allow this problem to outlive me.

(*Ibid.*)

28(a). On September 29, 2010, Ms. Montgomery sent Respondent an email attaching a letter in response to his September 1, 2010 letter. The attached letter was not offered in evidence, so its contents were not established.

28(b). On the same day, Respondent sent an email to Ms. Montgomery stating,

> This matter has already been litigated. I do not know what you propose to be mediated. Please state what the issues will be. If it is to be a mathematical computation, it is one thing. If you intend to have the

entire matter mediated it is another thing.

[Y]our position is also that the Settlement Agreement is not binding on your office, but the matter should be recalculated ab initio. . . . [¶] You delayed the resolution of this matter for many months or a year on the claim that it had been referred to your attorneys. I have never had contact from them. I would like to have them read my Points and Authorities from the original case, which clearly states the law, and which was in effect agreed to by your office and your attorneys at time the Settlement Agreement was entered into and then speak with me. [¶] In my previous correspondence, I stated that if the amount due were not paid by October 1, I would place the matter in the hands of an attorney. October 1 is Friday, and I do not intend to wait past that date.

I would also point out to you that the non-disclosure clause in the Settlement Agreement has been abrogated by the breach of contract of your office. However, even if it were not, it only prohibits me from speaking about the settlement. Nothing has ever prevented me from speaking about the law and the fact that your office has been in violation of the law in the method of making payments to some 1000 to 1500 retired judges in accordance with the Supreme Court cases. Despite not being precluded from doing so, I have remained mute on this issue for 15 years. After the way I have been treated by you and your office I see no reason to remain mute any further.

(Exhibit 18.)

29. On May 4, 2011, Ms. Montgomery sent Respondent a letter stating:

This is in response to your letter of September 1, 2010, in which you continue to disagree with our calculations of your retirement allowance. [¶] The Settlement Agreement you signed on October 8, 1996, provided for the [JRS] to calculate your allowance based on the definition in former Government Code section 68203 and based on the compensation you were entitled to on the date of your retirement, pursuant to [*Olson*]. We have complied with the terms of the Settlement Agreement and have calculated your retirement allowance based on the following:

1. The salary of a Municipal Court Judge as of January 15, 1979, under GC section 68203 prior to the amendment of January 1, 1977, which was $51,193, or a monthly salary of $4,266.08. . . .

2. Cost of living adjustments (COLA) have been applied to your current allowance consistent with the full CPI increase applied to judicial salaries prior to January 1, 1977. We confirmed that all COLA increase to judicial salaries prior to the amendment in GC section 68203 on January 1, 1977, were based upon the California Consumer Price Index, Urban Wage Earners (CCPI-W). The change to the index was measured from December to December and the increase was applied the following September 1.

When you received your first retirement allowance effective May 28, 1995, you were paid a percentage of the active judicial salary in effect at that time. In October 1996, the Settlement Agreement was signed and JRS staff recalculated your allowance. However, there was a substantial error made during that calculation and the amount paid to you was incorrect.

In calculating the COLA for September 1987, JRS staff inadvertently applied a 9% COLA to the salary, instead of the actual 1.9% COLA, resulting in a 7% increase to salary that should not have been applied. Over the years, this error resulted in an overpayment to you totaling approximately $93,304.19.

Your current monthly allowance of $7,438.09 is correct based on the terms of the 1996 Settlement Agreement. GC section 20160(b) requires that we correct all errors made by the System. JRS cannot pay you based on an erroneous amount calculated in error by JRS staff in 1996. Therefore, we are denying your request for additional increases to your monthly allowance and your request for lump sum payment of unpaid retirement allowance and interest.

You have the right to file an appeal of this determination. . . .

(Exhibit X.)

30(a). On May 31, 2011, Respondent sent a letter to JRS notifying it that he was appealing the May 4, 2011 denial of his request for increase to his monthly allowance and for payment of unpaid retirement allowance plus interest. In his letter, he noted that he and JRS had "fully settled" their dispute in the Settlement Agreement of 1996. He noted that rescission requires reasonable diligence (citing Civil Code 1691), that changing the settlement agreement is barred by laches, and that attacking the settlement agreement is barred by estoppel. (Exhibit V.)

30(b). In his May 31, 2011 letter, Respondent asserted that "in a prior letter dated

August 9, 2010, Ms. Montgomery clearly states: 'GC section 20164(b)(1) provides that where this System makes an erroneous payment to the member, our right to collect expires three years from the date of payment. Because we are only authorized to collect any overpayment that occurred during the past three years, we will not collect the $95,449.88 you were overpaid.'" (Exhibit V.) However, the August 9, 2010 letter purportedly authored by Ms. Montgomery was not submitted as evidence. Consequently, any admission by JRS regarding a limitation period for collecting overpayment was not established by the evidence.

31. In 2010, Respondent sought legal counsel assist him in resolving his dispute with JRS. In the ensuing years, that consultation morphed into a Superior Court case brought by Respondent and his counsel on behalf of numerous retired judges seeking increased retirement allowances based on Respondent's interpretation of *Olson*. That case wended its way up to the Court of Appeal, resulting in a reported decision, *Staniforth v. Judge's Retirement System* (2014) 226 Cal.App.4th 978. (See Factual Finding 34.)

32(a). In the interim, on December 29, 2011, JRS sent Respondent's counsel a letter to supplement Ms. Montgomery's May 4, 2011 denial letter. The December 29, 2011 letter asserted that "Upon further review of the settlement agreement and [*Olson*], JRS has determined that it has not been paying [Respondent] a retirement allowance 'pursuant to [*Olson*].' This has resulted in substantial over-payments to [Respondent]." (Exhibit 27.) The letter also asserted the Respondent had "breached the settlement agreement by disseminating its contents, thereby causing a failure of the only purported consideration he gave under the settlement agreement." (*Ibid.*)

32(b). The letter further noted that the JRS would be serving its Statement of Issues in approximately 40 days and:

> JRS will be seeking a reduction in [Respondent's] retirement allowance to bring it into compliance with [*Olson*]. Further, JRS reserve[s] its rights to seek repayment of all amounts that it can lawfully recover from [Respondent] in the event that the Board of Administration and the courts find that JRS has paid [Respondent] amounts in excess of what is allowed . . . .

(*Ibid.*)

32(c). Unlike the May 4, 2011 denial letter from which Respondent appealed, the December 29, 2011 letter adding the issue of recovering overpayment did not specify, "You have the right to file an appeal of this determination. . . ." Respondent did not file any appeal in response to the December 29, 2011 letter.

33(a). Although Respondent filed his notice of appeal in 2011, the Statement of Issues

was not signed until March 10, 2015. and this matter was not filed with the Office of Administrative Hearings until March 25, 2015. During that delay, the *Staniforth* case was decided by the Court of Appeal.

33(b). Between the time Respondent filed his notice of appeal (in 2011) and the decision in *Staniforth*, the parties came to an agreement regarding the processing of Respondent's administrative appeal. On April 6, 2012, JRS counsel sent Respondent an email stating, "We had anticipated serving a statement of issues relating to your personal administrative appeal by now. We have not done so, because on March 2, [2012] we raised the possibility of taking all of the *Olson v. Cory* claims directly to superior court, and we were awaiting a response to that suggestion before serving a statement of issues on your personal claim. You and [your counsel] then filed a Petitioner/Complaint on behalf of the other retired judges and justices in superior court on March 8, and served JRS with the Petition/Complaint on March 16. . . ." (Exhibit 36, attachment A.) JRS counsel suggested the possibility of "staying your administrative appeal pending resolution of the *Olson v. Cory* claims in superior court (and on appeal, as necessary)." (*Ibid.*)

33(c). On April 6, 2012, Respondent replied to JRS counsel's email, stating, "It was my intention to allow my claim to remain on hold until the resolution of the [*Staniforth*] Petitioners' claims. That is still satisfactory to me." (Exhibit 36, attachment A.) Respondent continued, "I know you have an overwhelming amount of work to do and may not have fully analyzed my claim. With all respect. I will point out what is in issue here." (*Ibid.*) For the remainder of Respondent's April 6, 2012 email, he asserted that the Settlement Agreement was binding, and detailed why he believed that the calculations of his COLA's after 2002 were erroneous and not conforming to the settlement agreement. Respondent did not address JRS's December 2011 assertion of recouping erroneous overpayments.

33(d). On April 6, 2012, JRS counsel replied to Respondent's email as follows:

> Based on your statement [in your April 6, 2012 email] that it is to allow your claim to remain on hold until the resolution of the Petitioners' claims, I will not serve any statement of issues to commence your administrative appeal, at least for the time being. If either you or JRS determines that commencing those proceedings is appropriate in the future, I expect that one of us will raise that issue with the other and we will start a dialogue to determine the appropriate next step at that time.

(Exhibit 36, attachment A.)

33(e). On April 6. 2012, Respondent replied in an email: "That's fine." (Exhibit 36, attachment A.)

33(f). The parties' April 6, 2012 emails did not discuss JRS's asserted right to recoup

erroneous overpayments. Respondent did not agree to, nor did the parties discuss staying any specific statute of limitations or any time deadline for JRS's recoupment of overpayments.

34(a). The *Staniforth* case was decided by the Court of Appeal in 2014. In *Staniforth*, the judicial pensioners argued that "JRS should have paid them a percentage of the salary an active jurist would have hypothetically earned if that active jurist's salary had continued to rise based on unlimited COLA's after January 1, 1977." (226 Cal.App.4th at 983.) This argument was identical to Respondent's interpretation of *Olson*.

34(b). The *Staniforth* court analyzed the impact *of Olson* on judicial pensions and held as follows:

> The statutory scheme is clear that judicial pensioners are entitled to an allowance that is calculated as a fixed percentage of whatever salary is payable to the judge holding the particular judicial office to which the retired judge was last elected or appointed. (§§ 75032, 75033.5, 75076.) Although the right to the relevant fixed percentage is vested, and may not be impaired absent comparable new advantages, there is nothing in the JRS scheme that conferred on judicial pensioners a vested right to be exempted from changes in the underlying salary structure for active jurists. [Citation.] Although the 1969 amendment to section 68203 (for unlimited COLA adjustments to active jurists salaries) and the 1976 amendment to section 68203 (placing a cap on COLA adjustments to active jurists' salaries) indirectly impacted pensioners, it did so only because of (and to the extent that) pensioners' allowances were derivative of active jurists' salaries, and not because those statutes purported to have any direct application to the allowances paid to judicial pensioners or purported to confer any new vested rights on judicial pensioners that were separate and nonderivative from the rights enjoyed by active jurists.
>
> [¶] . . . [¶]
>
> This construction of the statutory scheme confirms our understanding that the import of the holdings of [*Olson*] was not to decouple the rights of judicial pensioners from the salaries paid to actual active jurists. Instead, we read [*Olson*] as confirming the allowances for judicial pensioners remained tethered to the salaries paid to actual (rather than hypothetical) active jurists, and [*Olson*] held the allowances for judicial pensioners were temporarily exempted from the cap on COLA's because, and only to the extent that, salaries for some actual active jurists were likewise temporarily exempted from the cap on COLA's.

(226 Cal.App.4th 978, 988-989.)

34(c). The *Staniforth* court further explained:

> Moreover, [Olson] made clear that the grandfathered benefits enjoyed by some active jurists and (derivatively) by some judicial pensioners were not of unlimited duration because it noted that, "as in the case of judges or justices who enter upon a new or unexpired term of a predecessor judge after 31 December 1976, benefits of judicial pensioners based on the salaries of such judges will be governed by the 1976 amendment." [Citation.] We conclude [Olson] merely reaffirmed that judicial pensioners had a right to a percentage participation in the salaries paid to active jurists, including "the increment of pro-rata increase in the salary of the judge occupying the office formerly occupied by [the pensioner, which] salary fluctuates with cost of living increases" [Citation], but did not confer on or recognize any right of judicial pensioners to be exempted from changes in the underlying salary structure applicable to such active jurists, including changes to the COLA's adopted by the 1976 amendment. To the extent 162 pensioners' claims are based on the theory that [Olson] held judicial pensioners are exempted from changes in the underlying salary structure applicable to actual active jurists, those claims must fail. . . .

(*Id.* at 990-991.)

34(d). Essentially, the *Staniforth* court confirmed that Respondent's interpretation of *Olson* was incorrect.

35. Despite the *Staniforth* holding, Respondent continues to insist that his interpretation of *Olson* is correct.

36. In this case, the Statement of Issues opposes enforcement of any part of the 1996 settlement agreement, alleging that the 15-year-old agreement is "void as against public policy." (Exhibit 27, p. 4, para. 14.) The Statement of Issues lists the "Issues for Determination" as:

> (1) Whether, under the terms of the Settlement Agreement, [Respondent] is entitled to receive a retirement allowance that is greater than what is permitted under the Judge's Retirement Law, [*Olson*] and [*Staniforth*], and if so, what the proper amount of his retirement allowance under that Settlement Agreement should be.
>
> (2) If . . . [Respondent] is entitled to receive a retirement

allowance greater than what is permitted under the Judge's Retirement Law, [*Olson*] and [*Staniforth*], whether the Settlement Agreement is void as against public policy.

(3) If . . . [Respondent] is entitled to receive a retirement allowance greater than what is permitted under the Judge's Retirement Law, [*Olson*] and [*Staniforth*], and [if] the Settlement Agreement is not void as against public policy, then whether [Respondent] breached his promise to "keep the terms of this agreement confidential" and therefore may not enforce the Settlement Agreement.

(4) Whether the JRS should offset [Respondent's] prospective retirement allowance payments pursuant to Government Code section 20160 et seq., to recover any overpayments the JRS has made to [Respondent] and if so, what the terms of such offsets should be. . . .

(5) Whether the JRS owes [Respondent] any amounts for alleged past underpayments and, if so, how much the JRS owes [Respondent].

(Exhibit 27, pp. 5-6.)

37. At the administrative hearing, JRS provided an accounting specifying both the retirement allowance amounts paid to Respondent under the settlement agreement and the amounts that would have been paid under Government Code section 75033.5 if no settlement agreement had been executed. JRS is seeking to recoup the difference of approximately $514,515.74 in overpayments including interest from Respondent.

38(a). In focusing its efforts on the unraveling of the settlement agreement and obtaining repayment, JRS did not address the impetus of this dispute: the propriety of JRS's calculation of cost of living increases. At the hearing, JRS provided no evidence to explain the purported accounting error in determining the benchmark salary under the settlement agreement (as noted in Ms. Montgomery's May 4, 2011 letter), nor did the JRS provide testimony to support its calculation of the cost of living calculations under the settlement agreement (i.e. what CPI it was using and why).

38(b). Respondent provided CPI percentage comparisons between the CPI-U and CPI-W, noting the differences in the calculations of cost of living increases under those indices. He also noted that despite its correspondence contradicting his assertion of the propriety of using the CPI-W, JRS had used the CPI-W to calculate his cost of living

increases. Respondent pointed to a September 18, 2015 letter JRS sent to him stating:

> We have applied a .886 percent cost of living adjustment to your allowance effective September 1, 2015. . . . [¶] This percentage is based on the California Consumer Price Index Urban Wage Earners and Clerical Workers (CCPI-W), December 2013 to December 2014. . . .

(Exhibit V.)

39. At the administrative hearing, to establish JRS's breach of the settlement agreement, Respondent provided an accounting of the cost of living adjustments made by JRS since execution of the settlement agreement. Many of the cost of living adjustments were provided to him late and in some years not provided at all. JRS provided no evidence to contradict that cost of living adjustments were provided late or not at all. JRS provided no evidence to explain or contradict that, in 2009, Ms. Montgomery directed staff by email not to provide Respondent a cost of living adjustment.

40. At the hearing and in post-hearing briefing, Respondent maintained that his interpretation of *Olson* is correct. He insisted that there are no grounds to find the settlement agreement void and that JRS is precluded from now revising that agreement (citing various legal grounds, discussed below). Respondent insisted that he did not breach the confidentiality provision of the settlement agreement.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. According to the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.), the burden of proof flows from the type of process initiated. If CalPERS (or in this case, the JRS administered by CalPERS) initiates the process to take away a person's right or benefit (e.g. involuntarily discontinuing disability retirement), an Accusation should be filed, and CalPERS has the burden of proving the propriety of eliminating that right or benefit (e.g. that the person is no longer disabled). Where CalPERS denies or modifies a benefit to a member/applicant and either the member/applicant or another respondent appeals CalPERS' decision, the proceeding is initiated by a Statement of Issues, and the appealing respondent has the burden of proof that the determination was incorrect. (See also, Evid. Code, § 500.) Nevertheless, CalPERS does have the burden of producing the evidence to support its determination before the appealing party seeks to establish the impropriety of that determination.

2. The standard of proof in administrative matters is the preponderance of the

evidence unless a law or statute requires otherwise. (Evid. Code, § 115.) In this case, no other law or statute was cited or applies.

3. In this matter, JRS determined that it could modify Respondent's agreed-upon retirement allowance by asserting that their settlement agreement was void. Respondent appealed that determination seeking to uphold the terms of the settlement agreement. JRS met its burden in establishing that the settlement agreement is unenforceable under the law and that Respondent's retirement allowances should be corrected. Respondent failed to establish that JRS is legally required to uphold the terms of the settlement agreement. However, Respondent did establish that JRS should be estopped from further adjusting Respondent's future retirement allowances to recoup $514,515.74 overpaid to him pursuant to the settlement agreement.

Motion to Strike – Res Judicata Does Not Apply

4. Respondent filed a Motion to Strike paragraphs 3 through 14 of the Statement of Issues on the grounds that those issues were previously litigated and determined in the prior OAH case. JRS opposed the Motion to Strike. The Motion to Strike is denied for the following reasons:

(a). The California Supreme Court has described the related doctrines of collateral estoppel and res judicata as follows:

> As generally understood, "[t]he doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy." (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 280, p. 820.) The doctrine "has a double aspect." (*Todhunter v. Smith* (1934) 219 Cal. 690, 695, 28 P.2d 916.) "In its primary aspect," commonly known as claim preclusion, it "operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]" (*Clark v. Lesher* (1956) 46 Cal.2d 874. 880, 299 P.2d 865.) "In its secondary aspect," commonly known as collateral estoppel, "[t]he prior judgment ... 'operates' " in "a second suit ... based on a different cause of action ... 'as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' [Citation.]" (*Ibid.*) "The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.

[Citations.]" (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 556, 90 Cal.Rptr.2d 469.)
(*People v. Barragan* (2004) 32 Cal.4th 236, 252-53.)

(b). Decisions resulting from administrative hearings can be given preclusive effect. (*People v. Sims* (1982) 32 Cal.3d 468.)

(c). In the matter at hand, neither res judicata nor collateral estoppel apply since the prior proceeding did not result in a final judgment on the merits. Instead, the matter was settled prior to hearing, and a settlement does not constitute a "final judgment on the merits."

Contractual Remedy of Rescission under Civil Code section 1689 is not Properly at Issue; Respondent did not Breach the Settlement Agreement

5. In its Post-Hearing Brief, JRS asserts that "JRS is entitled to rescind the Settlement Agreement," and cites Civil Code section 1689. This assertion was not in the Statement of Issues, and it is questionable whether orders regarding such contractual remedies under the Civil Code, including the rescission of a settlement agreement, can be made in this proceeding. Consequently, a determination of whether the settlement agreement can be rescinded under Civil Code section 1689 will not be made in this Proposed Decision.

6. However, some of the assertions made by JRS in asserting the propriety of rescission, as well as its assertion that Respondent breached the agreement, are addressed below since they have some bearing on the equitable estoppel discussion (below):

(a). Contrary to JRS's assertion, the settlement agreement was not "given by mistake or obtained through duress, menace, fraud or undue influence." (Exhibit 33, p. 8, lines 22-24.) JRS's attempts to now characterize Respondent as threating JRS to settle the prior OAH case is overreaching. JRS knew that Respondent's interpretation of *Olson* was wrong, but affirmatively chose to draft and execute the settlement agreement to avoid litigation. The agreement was not formed through duress, menace or undue influence by Respondent, but was negotiated by Respondent zealously advocating his position and by JRS, (with its decision-making resources including legal counsel at its disposal) determining that it could and would enter into the settlement agreement.

(b). Respondent did not fail to provide lawful consideration. Respondent agreed to keep the terms of the settlement agreement confidential and agreed to forego the OAH hearing scheduled in 1996. Although JRS asserts that Respondent's confidentiality promise was "illusory, because the settlement agreement was a public record by law" (Exhibit 33, p. 10, lines 5-6), JRS provided no authority to support its assertion. JRS cited to the Public Records Act (Govt. Code, § 6250 et seq.), but that Act does not specify that a settlement agreement regarding an individual's retirement allowance is subject to disclosure. However,

it also does not exempt such agreements from disclosure. Even if the settlement agreement was subject to disclosure under the Public Records Act, the JRS, not Respondent, was the entity to whom any Public Records Act request for disclosure would be directed, and Respondent was not prevented from maintaining confidentiality as he promised. Moreover, Respondent's silence was not the only consideration he provided. He also chose to forego his right to a hearing in the prior OAH matter; as set forth in the settlement agreement, the parties settled the prior OAH case "solely to avoid the expense and uncertainty of litigation." (Exhibit 1.) There was no evidence or authority presented that Respondent's consideration was invalid.

(c). Respondent correctly pointed out that, although he had agreed not to disclose the terms of the settlement agreement, he was not precluded under the settlement agreement from speaking to other judges about his interpretation of *Olson*. Moreover, given the JRS's delays in providing cost of living adjustments, and in some years determining not to provide any cost of living adjusiment, the JRS breached the settlement agreement well prior to Respondent speaking to other judges about his *Olson* interpretation. The totality of the evidence demonstrated that Respondent did not breach the settlement agreement, and that any disclosure of his *Olson* theory occurred after JRS had breached the settlement agreement.

The 1996 Settlement Agreement is Unenforceable

7. The central issue in this matter is whether the provisions of the 1996 settlement agreement must be enforced. JRS established that the settlement agreement is unenforceable for the following reasons:

(a). "The terms and conditions relating to employment by a public agency are strictly controlled by statute or ordinance, rather than by ordinary contractual standards." (*Markman v. County of Los Angeles* (1973) 35 Cal.App.3d 132, 134-135.) Judges' retirement benefits are determined by the Judges Retirement Law. Specifically in this case, Government Code section 75033.5 provides the formula for calculating a judge's retirement allowance. That formula uses as a benchmark salary the "compensation payable at the time payments of the allowance fall due, to the judge holding the office which the retired judge last held."

(b). Employees cannot contract around statutory compensation provisions, and any agreements to pay benefits in excess of the law are not enforceable. Courts have consistently held that "[s]tatutory definitions delineating the scope of PERS compensation cannot be qualified by bargaining agreements." (*Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 201 (citing *Service Employees International Union v. Sacramento City Unified School Dist.* (1984) 151 Cal.App.3d 705, 709-710); *Police Officers Assn. v. City of Pomona* (1997) 58 Cal.App.4th 578, 585.) In *Oden*, the court noted that the definition of what constitutes "compensation" under the Public Employees Retirement Law is the province of the Legislature, not the PERS Board. (23 Cal.App.4th 194, 201.) Likewise, the *Pomona*

court noted that the statutory definition "cannot be changed either by the collective bargaining agreement or by PERS." (58 Cal.App.4th 578, 585) Consequently, a public agency's agreement to provide for an option contrary to statute is unenforceable. (*Id.* at 589.)

(c). Respondent's retirement allowance under the settlement agreement deviates from the formula set forth in Government Code section 75033.5 in that his benchmark salary is not the benchmark specified by the statute.

(d). No statute or case law exempts Respondent from the statutory mandates for computing retirement allowance under Government Code section 75033.5. Despite his assertions to the contrary, Respondent's benchmark salary under the settlement agreement was based on an incorrect interpretation of *Olson*.

(e). Given the foregoing, the settlement agreement is unenforceable because it contrary to statutory specifications for retirement allowances and provides for benefits in excess of the law.

No Statute of Limitations Precludes JRS from Correcting the Erroneous Calculation of Respondent's Retirement Allowance by Application of the Appropriate Benchmark Salary to Future Retirement Allowances

8. Government Code section 20160 (Corrections of errors and omissions) provides, in pertinent part:

> (a) Subject to subdivisions (c) and (d), the board may, in its discretion and upon any terms it deems just, correct the errors or omissions of any active or retired member, or any beneficiary of an active or retired member, provided that all of the following facts exist:
>
> (1) The request, claim, or demand to correct the error or omission is made by the party seeking correction within a reasonable time after discovery of the right to make the correction, which in no case shall exceed six months after discovery of this right.
>
> [¶] . . . [¶]
>
> (b) Subject to subdivisions (c) and (d), the 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.
>
> (c) The duty and power of the board to correct mistakes, as provided in this section, shall terminate upon the expiration of obligations of this

system to the party seeking correction of the error or omission, as those obligations are defined by Section 20164.

(d) The party seeking correction of an error or omission pursuant to this section has the burden of presenting documentation or other evidence to the board establishing the right to correction pursuant to subdivisions (a) and (b).

(e) Corrections of errors or omissions pursuant to this section shall be such that the status, rights, and obligations of all parties described in subdivisions (a) and (b) are adjusted to be the same that they would have been if the act that would have been taken, but for the error or omission, was taken at the proper time. However, notwithstanding any of the other provisions of this section, corrections made pursuant to this section shall adjust the status, rights, and obligations of all parties described in subdivisions (a) and (b) as of the time that the correction actually takes place if the board finds any of the following:

(1) That the correction cannot be performed in a retroactive manner.

(2) That even if the correction can be performed in a retroactive manner, the status, rights, and obligations of all of the parties described in subdivisions (a) and (b) cannot be adjusted to be the same that they would have been if the error or omission had not occurred.

(3) That the purposes of this part will not be effectuated if the correction is performed in a retroactive manner.

(Emphasis added.)

9. Government Code section 20164 provides:

(a) The obligations of this system to its members continue throughout their respective memberships, and the obligations of this system to and in respect to retired members continue throughout the lives of the respective retired members, and thereafter until all obligations to their respective beneficiaries under optional settlements have been discharged. The obligations of the state and contracting agencies to this system in respect to members employed by them, respectively, continue throughout the memberships of the respective members, and the obligations of the state and contracting agencies to this system in respect to retired members formerly employed by them, respectively, continue until all of the obligations of this system in respect to those retired members, respectively, have been discharged. The

obligations of any member to this system continue throughout his or her membership, and thereafter until all of the obligations of this system to or in respect to him or her have been discharged.

(b) For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions, whether pursuant to Section 20160, 20163, or 20532, or otherwise, the period of limitation of actions shall be three years, and shall be applied as follows:

(1) In cases where this system makes an erroneous payment to a member or beneficiary, this system's right to collect shall expire three years from the date of payment.

(2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.

(c) Notwithstanding subdivision (b), in cases where payment is erroneous because of the death of the retired member or beneficiary or because of the remarriage of the beneficiary, the period of limitation shall be 10 years and shall commence with the discovery of the erroneous payment.

(d) Notwithstanding subdivision (b), where any payment has been made as a result of fraudulent reports for compensation made, or caused to be made, by a member for his or her own benefit, the period of limitation shall be 10 years and that period shall commence either from the date of payment or upon discovery of the fraudulent reporting, whichever date is later.

(e) The board shall determine the applicability of the period of limitations in any case, and its determination with respect to the running of any period of limitation shall be conclusive and binding for purposes of correcting the error or omission.

10(a). Respondent asserts that Government Code section 20160, subdivision (a)(1), precludes changes to the 1996 settlement agreement, since the request for correction occurred more than six months after discovery. However that section applies to errors or omissions of any "member" or "beneficiary," not the errors of JRS or CalPERS. Instead, the applicable statute and subdivision is Government Code section 20160, subdivision (b), which mandates CalPERS to correct any "actions taken as a result of errors [of] this system."

10(b)(1). Government Code section 20160, subdivision (b), requires JRS to correct its erroneous calculation of Respondent's retirement allowance by application of the statutorily specified benchmark salary. Additionally, the correction of its prior error is not barred by any

statute of limitations. (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29.)

10(b)(2). The *City of Oakland* case dealt with the retroactive reclassification of certain employees as firefighters, creating an unfunded liability for City which opposed the reclassification. The *City of Oakland* court held that CalPERS had the power to correct erroneous classifications by retroactively reclassifying the employees and that this retroactive reclassification was not barred by any statute of limitations. The court found that the Code of Civil Procedure's (CCP) "mistake" statute of limitations was not applicable to CalPERS "administrative reclassification proceedings." (95 Cal.App.4th 29, 44.) The court noted that the CalPERS Board had also appropriately determined that "'The statute of limitations contained in Government Code section 20164(b) applies to erroneous payments into or out of the retirement fund, not to reclassifications. . . .'" (*Id.* at p. 45) The court also limited its holding to administrative proceedings, stating, "We decline to express any opinion about the application of the mistake statute, or any other statute of limitation, to a theoretical future civil action by PERS to seek arrearages or otherwise judicially enforce the consequences of its reclassification decision. The ALJ's decision, which was adopted by the Board, did not require anyone to pay any money; it merely reclassified the employees." (*Id.* at p. 49.)

11(a). In this case, similar to *City of Oakland*, no statute of limitations precludes JRS from correcting its erroneous calculation of Respondent's retirement allowance caused by its agreement to use a benchmark salary which was not sanctioned by statute or by *Olson*. Under statutory mandate, JRS must apply the appropriate benchmark salary to the required retirement formula for calculation of Respondent's future retirement allowances.

11(b). However, as noted above, the court in *City of Oakland* expressly declined to extend its holding to include the "consequences" of the reclassification/correction: i.e., to require someone to pay money. Consequently, while no statute of limitations bars JRS from correcting its erroneous calculation of Respondent's retirement allowance, there is a statutory limitation period for collection of any erroneous overpayment. As set forth below, if recalculation of Respondent's allowance were to be applied retroactively, JRS's right to recoup overpayment would expire three years after the overpayment was made (Legal Conclusion 13). Nevertheless, recalculation of Respondent's allowance should be applied only prospectively from the date of this decision, and should not be applied retroactively (see Legal Conclusion 14 through 17 discussing estoppel).

The Three-Year Expiration of the Right to Collect Overpayments, Set Forth in Government Code section 20164, subdivision (b), Applies to Any Adjustments made to Respondent's Future Allowance to Correct Overpayment of Respondent's Retirement Allowance

12. Government Code section 20163, subdivision (a), 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.

13(a). Government Code section 20164, subdivision (b)(1), provides that, for adjustments of erroneous payments made to a member out of the retirement fund, "the period of limitation of actions shall be three years," and CalPERS's right to collect "shall expire three years from the date of payment. (See Legal Conclusion 9.)

13(b). Respondent asserts that Government Code section 20164, subdivision (b), provides a time limitation for this matter. (Exhibit V, pp. 14-15.) JRS asserts that the limitation period in section 20164, subdivision (b), does not apply to administrative proceedings, citing *City of Oakland*.

13(c). In *City of Oakland* (holding that the CCP statute of limitation did not apply to administrative reclassification proceedings), the court noted that "Limitation periods are . . . provided for in the acts governing some administrative proceedings," (95 Cal.App.4th 29, 48), and that "The Legislature has prescribed time limitations in some administrative cases." (*Id.* at p. 50.) The court further noted that, "As relevant to the PERS Board, the Legislature has prescribed a six-month period in which the Board may correct 'errors or omissions of any active or retired member[.]' (§ 20160. subd. (a).)" (*Ibid.*) However, the court further reasoned. "The Legislature has also set forth limitations regarding *civil actions* pertaining to matters within the PERS Board's purview. Actions to adjust CalPERS mistakes resulting in 'payments into or out of the retirement fund' are normally barred after three years, as with the general mistake statute." (*Id.*) While the *City of Oakland* court suggests that Government Code section 20164, subdivision (b), provides a limitation period for civil actions, it did not specifically hold that Government Code section 20164, subdivision (b), is inapplicable to administrative actions to adjust CalPERS's mistakes resulting from payments into or out of the retirement fund, and JRS provided no other authority to support such an assertion. Additionally, it is not logical that a civil action to adjust such mistakes is barred after three years, but an administrative action to make the same adjustments has no similar time bar. Consequently, the three-year limitation of actions under Government Code section 20164, subdivision (b), applies to administrative actions to make adjustments to correct erroneous overpayments to Respondent from the retirement fund. Any adjustments made under Government Code section 20163, subdivision (a), are limited to three years from the date of payment under Government Code section 20164, subdivision (b)(1).

13(d). However, neither the statute nor case law indicates what event triggers the three-year limitation of the right to collect erroneous payments. In this case, JRS sent its supplemental denial letter on December 29, 2011, stating that it "reserve[s] its rights to seek repayment of all amounts that it can lawfully recover from [Respondent] in the event that the Board of Administration and the courts find that JRS has paid [Respondent] amounts in

excess of what is allowed." (Exhibit 27.) However, unlike the May 4, 2011 denial letter from which Respondent appealed, the December 29, 2011 letter adding the issue of overpayment did not specify that Respondent had a right to appeal the "determination" that he owed money, and the December 29, 2011 letter reserving the right to seek repayment at a later time cannot be construed as an action to collect erroneous repayments. Consequently, the action to collect erroneous payments occurred at the earliest on March 25, 2015, when JRS filed its Statement of Issues seeking an order to recover any overpayments. This action came after confirmation by the *Staniforth* court that Respondent's interpretation of *Olson v. Cory* (and therefore, the calculation and payments under the Settlement Agreement) were erroneous.

13(e). JRS asserts that, if the three-year limitations period applies, JRS should be allowed to recover overpayments made to Respondent after April 6, 2009. JRS contends that it did not file its Statement of Issues until March 25, 2015 because the April 6, 2012 emails constituted an agreement to stay this proceeding and should result in an equitable tolling of any applicable limitations period. These assertions are not persuasive. The April 6, 2012 emails contained Respondent's agreement to stay his administrative appeal (regarding his request for increases to his monthly allowance) pending resolution in *Staniforth*. The April 6, 2012 emails did not discuss JRS's asserted right to later recoup erroneous overpayments. Respondent did not agree to, nor did the parties discuss staying any specific statute of limitations or any time deadline for JRS's recoupment of overpayments. JRS notes that application of the doctrine of equitable tolling requires, among other things, "lack of prejudice to the defendant" (citing *Addison v. State of California* (1978) 21 Cal.3d 313, 319). In this case, if equitable tolling was applied in the manner JRS suggests, there will be considerable prejudice to Respondent in that he would be exposed to greater liability for several more years of overpayments and accumulated interest. JRS also notes that equitable tolling is "designed to prevent unjust and technical forfeitures of the right to a trial on the merits. . . ." (citing *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99). In this case, without the application of equitable tolling, there has been no forfeiture of the right to trial on the merits.

13(f). Given the foregoing, JRS's action seeking to collect its overpayment commenced on March 25, 2015. JRS is barred by statute from obtaining overpayment of any retirement allowances made prior to March 25, 2012.[1]

13(g). Although JRS would be entitled under statute to recover overpayments made to Respondent from March 25, 2012 forward, the doctrine of equitable estoppel applies in this case (see Legal Conclusions 14 through 17), and JRS is estopped from recouping any

[1] Based on the Declaration of Pamela Montgomery, the amount of accumulated overpayment, excluding interest, from April 1, 2012 through August 31, 2016, is $17,316. (Exhibit 37, attachment C)

overpayments made to Respondent as discussed below. Consequently, Respondent's future retirement allowances should reflect the correct statutory calculation, without adjustments to recoup any overpayments made pursuant to the settlement agreement.

JRS is Estopped from Adjusting Respondent's Future Retirement Allowances to Recoup $514, 515.74 Overpaid Pursuant to the Settlement Agreement

14. Even if JRS were not limited in its recovery (as set forth in Legal Conclusion 13), JRS is estopped from adjusting Respondent's future allowances to recoup any of the $514, 515.74 overpaid to Respondent pursuant to the settlement.

15(a). JRS asserts that equitable estoppel is not available to Respondent to "avoid repaying his overpayments" because "the proper amount of [Respondent's] benefits is a matter that is 'plain and fully covered by statute' [citing *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522, 542-543]." (Exhibit 34, p. 7, lines 2-7.) This assertion may be correct if applied to the correction of Respondent's prospective retirement allowances, which must comply with the mandatory formula set forth in Government Code section 75033.5 (see Legal Conclusions 7 through 11; see also, fn. 1). However, JRS's assertion and citation to *Pleasanton* is not persuasive as applied to CalPERS's discretionary adjustment of Respondent's future allowances under Government Code section 20163, subdivision (a).

15(b). Appellate courts have held that "estoppel is barred where the government agency to be estopped does not possess the authority to do what it appeared to be doing." (*Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 870.) In *Medina*, the court of appeal found estoppel was not available because the retirement board lacked authority to classify as safety members employees whose duties did not meet the statutory definition of safety members. Additionally, in *City of Pleasanton, supra*, the court declined to apply equitable estoppel to allowing standby pay to be used in the formula for calculating a member's pensionable compensation because CalPERS was precluded by statute from doing so. However, *Medina* and *Pleasanton* are distinguishable from the case at hand in that estopping the collection of overpayments would not require CalPERS to exceed its statutory authority, as set forth in Legal Conclusions 15(c), 15(d) and 15(e).

15(c). In this case, JRS seeks to adjust Respondent's future retirement allowances to recover overpayment of benefits. JRS notes that CalPERS has "broad discretion with respect to recovery of overpaid benefits" (Exhibit 33, p. 11, lines 22-23), and JRS correctly cites *City of Oakland v. Oakland Police and Fire Retirement System* (2014) 224 Cal.App.4th 210. In *Oakland Police*, the court addressed CalPERS's discretionary ability to require employees to repay overpaid retirement benefits. The *Oakland Police* court held, "Since the Board has discretion in this area, applying the doctrine of estoppel to prevent the Board from collecting certain specified overpayments would not result in a situation where the Board is required to act

in excess of its statutory authority." (224 Cal.App.4th 210, 245.)

15(d). The *Pleasanton* case (cited by JRS) also acknowledged the potential in some cases for application of equitable estoppel where CalPERS has discretionary power, citing *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567. In *Crumpler*, the city had misclassified animal control officers as police officers, and had made representations to those employees that they were in fact entitled to greater safety member benefits. When the misclassification came to CalPERS's attention, it reclassified the officers retroactively as miscellaneous members with less pension benefits and the employees sued. The *Crumpler* Court found that CalPERS had broad authority to reclassify its members and was estopped from retroactively reclassifying petitioners as of the date of their initial membership in the system. The *Crumpler* Court "recognized the rule that estoppel cannot enlarge a public agency's statutory or constitutional authority but found the rule was inapplicable because of a PERS provision . . . stating PERS was the 'sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.'" (*Pleasanton*, *supra*, 211 Cal.App.4th at 543, quoting *Crumpler*, *supra*.) The *Crumpler* court concluded that, "In view of the statutory powers conferred upon the board . . ., this is not a case where the governmental agency 'utterly lacks the power to effect that which an estoppel against it would accomplish.'" (32 Cal.App.3d 567, 584, quoting *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 499; *City of Pleasanton*, *supra*, 211 Cal.App.4th at 543.)

15(e). In this case, similar to *Oakland* Police, since CalPERS has broad discretion regarding the recovery of overpaid benefits and the adjustment of Respondent's future allowances under Government Code section 20163, subdivision (a), application of estoppel in this matter is not precluded.

16(a). Moreover, even if CalPERS does not have statutory authority to forgive the overpayment, equitable estoppel may still be applied. In *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, the California Supreme Court held that equitable estoppel is available against a government entity, even if the requested relief is not within the government's legal authority, "when the elements requisite to such an estoppel against a private party are present and . . . 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." (*Id.* at pp. 496-497.) In this case, no effect on public policy would result from application of estoppel and justice dictates its application.

16(b). Almost 19 years ago, JRS stood on solid legal ground and should have held its position and proceeded to hearing, which it would have won. However, JRS chose to avoid the battle of litigation, and it crafted a retreat which JRS knew or should have known had no legal support. Years later, JRS unilaterally took a condemnatory view of the settlement agreement and proceeded to initiate its destruction. The principles of fundamental fairness demand that JRS be estopped from recouping $514,515.74, or any portion thereof, that it paid

to Respondent based on a settlement agreement JRS drafted and executed, and which Respondent believed to be valid and relied on for 19 years. It is in the public interest and the interests of justice to mitigate this situation and to relieve Respondent from the potential harm that will result from having his retirement allowance further decreased to repay $514,515.74, or any portion thereof, over the remainder of his life, in addition to the required decrease by way of recalculation to comply with Government Code section 75033.5. Based on the above, estoppel is available against JRS in this case, because it would be an injustice to not allow respondent to pursue it, and application of estoppel against JRS will not undercut a public policy or interest. It should be noted that, in this case, estoppel is applied retroactively, but not prospectively (i.e., to estop JRS from adjusting Respondent's future allowances to retroactively recoup any overpayments, but not to estop JRS from prospectively applying the correct statutory formula for Respondent's future allowances).[2]

17(a). In order to apply the doctrine of equitable estoppel, four elements must be present: (1) the party being estopped must be apprised of the facts; (2) the party must intend or reasonably believe that its conduct will be acted upon; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) the party asserting the estoppel must actually rely upon the other party's conduct to their detriment. (*City of Long Beach v. Mansell, supra,* 3 Cal.3d at 489.)

17(b). In this case, Respondent has established the four elements of equitable estoppel. First, JRS was apprised of the facts. It knew prior to and after execution of the settlement agreement that Respondent's interpretation of *Olson* was incorrect and that the settlement agreement terms it had drafted were contrary to law. Second, JRS intended its conduct would be acted upon. Specifically, it intended for the settlement agreement it drafted to be executed by Respondent and for its terms to be followed. Third, Respondent was ignorant of the true state of facts. Respondent did not know that his interpretation of *Olson*

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[2] Although the estoppel analysis could be similarly applied to determine whether to uphold the settlement agreement and estop recalculation of Respondent's retirement allowance under Government Code 75033.5, the balancing of equities would return a different conclusion regarding the application of estoppel. If required to abide by the settlement agreement, JRS would be exceeding its statutory authority by calculating Respondent's retirement allowance contrary to law. Moreover, given the finding that such calculations were erroneous, public policy could be adversely affected if the mistake was allowed to continue. In *Crumpler,* although the court applied estoppel to retroactive reclassification, it declined to extend estoppel to preclude prospective reclassification. The court pointed out, "Public interest and policy would be adversely affected if petitioners, despite the discovery of the mistaken classification, were required to be continued to be carried as local safety members when all other contract members of the retirement system throughout the state performing like duties and functions are classified as miscellaneous members. Manifestly, it would have a disruptive effect on the administration of the retirement system." (*Crumpler, supra,* 32 Cal.App.3d 567, 584.)

was incorrect or that the settlement terms were contrary to law. In fact, Respondent continues to maintain his belief that his interpretation of *Olson* is correct and that the settlement agreement is enforceable. Additionally, Respondent was not apprised of JRS's assertion that the settlement agreement was unenforceable until 2011, 15 years after its execution, and JRS's assertion was not confirmed until the *Staniforth* decision in March 2015. And most significantly, Respondent actually relied upon JRS's conduct in entering into the settlement agreement and relying on it to his detriment, having unknowingly incurred up to $514,515.74 in overpayments which JRS now seeks to recoup.

17(c). Since all four elements have been proven, Respondent has met his burden of establishing by a preponderance of the evidence that estoppel applies in this case. JRS shall be estopped from adjusting Respondent's future allowances to recoup any of the $514,515.74 overpaid to Respondent pursuant to the settlement.

ORDERS

1. The 1996 settlement agreement between JRS and Respondent shall not be prospectively enforced.

2. Commencing from the effective date of this Order, JRS shall calculate Respondent Paul Mast's retirement allowance, pursuant to Government Code section 75033.5, as an annual amount equal to 3.75 percent of the compensation payable, at the time payments of the allowance fall due, to the judge holding the office which Respondent last held prior to his discontinuance of service as a judge, multiplied by 13 years, 2 months, 8 days of judicial service.

3. JRS shall be estopped from adjusting Respondent's future retirement allowances to recoup any of the $514,515.74 overpaid to Respondent pursuant to the settlement agreement.

DATED: September 16, 2016

DocuSigned by:
Julie Cabos-Owen
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JULIE CABOS-OWEN
Administrative Law Judge
Office of Administrative Hearing