

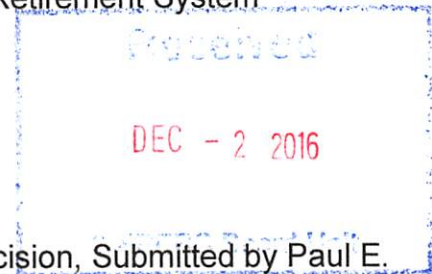
ATTACHMENT C
RESPONDENT'S ARGUMENT

November 25, 2016

Ref No. 2015-0662

Board of Administration of the California Public Employees' Retirement System

c/o Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701



Subject: Written Argument Against Proposed Decision, Submitted by Paul E. Davenport, Respondent.

Dear Board Members,

By way of a brief background this case began with a negotiated pay raise near the end of a contract that was by any measure eligible as final compensation. During the 2008 financial crisis the City of Claremont asked its employees, including the Police Management Association of which I was a member, to forego this raise. The employee group wanted to assist the City with the financial burden, but felt that employees about to retire were counting on the raise for their retirement as the raise had been negotiated two years earlier. The employee group and the City negotiated a side letter that maintained the raise for those retiring. This resulted in the raise being termed final settlement pay and ineligible as final compensation.

I worked in law enforcement for a little over 30 years. During that time I had wide discretion on how cases were handled. California Penal Code Section 4 states that the laws of the state must be enforced in the spirit of the law, not to the letter of the law. It states:

The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.

From the simplest traffic violation to a violent crime investigation, I was able to decide how they would be handled. I chose whether or not to stop a vehicle for a violation, whether or not to issue a citation, what section to cite for, and often whether or not to use a section that allowed arrest and booking. If I made an arrest a District Attorney reviewed the case and chose whether or not to file charges. Whether it was an arrest or citation, a judge had the option to send a case to trial or not, to find the person guilty or not and had a variety of discretion on sentencing. All of these discretionary decisions occurred whether or not there was a certainty of guilt, and often relied on whether or not the action was reasonable.

Looking at the side letter and the implementation schedule, I understand why PERS took the initial action it did. The documents are clear and unambiguous. It was, however, my impression that it was at my hearing in October, 2016, that the judge could

consider mitigating factors in making a proposed finding. It was to that end that during the hearing I began a line of questions designed to show that there was no unfunded liability incurred by PERS in this matter. Whether or not there was unfunded liability did not change the facts of the side letter, but could be a factor a judge might consider in a ruling in viewing the totality of circumstances. The judge quickly stopped my line of questioning, and although he ultimately reconsidered and said I could continue if I desired, he made it clear that it was irrelevant to him. I came to the understanding by the end of the hearing that the judge was weighing whether PERS had acted lawfully, not whether PERS had acted reasonably in calling the pay raise final settlement pay.

I'll use a short analogy to illustrate my concerns:

A car is driving down the road. There is a passenger in the front seat. The passenger can see that there is a pedestrian on the sidewalk up ahead. The passenger reaches over and yanks the steering wheel causing the car to veer onto the sidewalk, killing the pedestrian and crashing into a building. The police arrive and the passenger freely admits all of those facts. For this analogy, the facts I've just described represent the side letter and implementation schedule. They are simple, clear and unambiguous.

What the police also learn is that the car was just moments from entering a densely crowded farmers market with hundreds of pedestrians. The driver was suffering a seizure and was no longer able to control the vehicle. The passenger had just a moment to decide whether to do nothing - in which case they would incur no liability, would likely be uninjured but dozens might be killed - or to grab the wheel, possibly killing one and be injured them self.

One should not judge the inclusion or exclusion of the pay raise detailed in the side letter without considering the issue as a whole. An employee group was asked to help their employer by eliminating a negotiated pay raise during a financial crisis that spanned the country. They need only do nothing to ensure they all received the raise and that those soon to retire would be certain that the raise applied toward their highest year calculation. But, according to the PERS employee testifying as an expert at my hearing, if even one employee agrees to help the employer and forego the raise, the raise cannot be lawfully included in any compensation calculation with PERS for any other employee as it is now final settlement pay since not all employees enjoyed it, no matter the wording in any side letter.

This is akin to prosecuting the passenger in the analogy for murder, which would be accurate under the letter of the law, and ignoring their action that saved lives. From my perspective PERS seems to have developed a culture that believes the letter of the law must be followed in all cases, ignoring all mitigating factors. Chris Phillips, the PERS attorney at my hearing, was extremely nice, expressed sympathy and wished there were other options available to him but could not see any good ones available to me. Being in public service and dealing with frequent conflict and angry people, I sometimes felt the need to resort to the "my hands are tied, the law requires me to take this action" excuse. On most occasions that I used this excuse it was true, but often it was just a

way to placate the angry person who was not seeing that although other options were available to me the action I had taken was already the reasonable one. That excuse is acceptable to a point so long as the internal culture has not developed that it becomes the final answer to all questions. Discretion must be available at some point in an appeal process, particularly when it involves public agency decisions.

How, in my case, can employees of the City have done what could only be seen as 'the right thing' by giving up a pay raise to help with a financial crisis and yet allow fellow employees to receive the raise that was bargained for and, up to that point, eligible as final compensation by PERS.

In PERS Board of Administration Precedential Decision 00-06 under the heading "Determining Final Compensation" it begins: "The analytical approach used to determine whether disputed payments should be included in a members final compensation has to be consistent. Disputed payments are evaluated in light of relevant code provisions and the Legislative scheme. Where a particular statute is ambiguous, the intent of the act prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. Using this approach, a determination is made concerning the inclusion or exclusion of the disputed payments."

Although that Precedential Decision is not directly applicable to my situation, it is in that it suggests a desire by PERS to act in a manner that deviates from the strict rigidity of following the letter of the law and allow the matter to be viewed as reasonable or not.

The simple action for you is to say that this proposed action is lawful and leave it at that. You would not be incorrect. But I appeal to you that there must be some flexibility within the appeals process for the reasonableness of an action being considered.

With regard to a reasonable resolution of this matter I submit that the City of Claremont entered into an agreement that it felt was a satisfactory solution to their financial difficulty at the time. By withholding an anticipated pay raise for some employees, the City attempted to balance its own financial need with that of its employees. The City intended on funding the pay raise to PERS as final compensation and created no unfunded liability to PERS by withholding the raise to some employees. As allowing the pay raise to stand as final compensation creates no hardship for the City or for PERS, and allows a City and its employees to create a sensible and equitable solution for hardships that could not have been anticipated, I submit the reasonable action is to allow it as final compensation.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Davenport", written over the word "Sincerely,".

Paul Davenport