

ATTACHMENT A
STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT IN PART AND DECLINE IN PART THE PROPOSED DECISION ON REMAND

Overview

At its December 21, 2016, meeting, the CalPERS Board of Administration (Board) declined to adopt the Proposed Decision on Remand in this matter and granted a Full Board Hearing in connection with the appeal of Respondent Paul G. Mast (Mast).

Staff contends that the Board should:

1. Adopt the Proposed Decision on Remand's ruling that Mast's benefits should be paid in accordance with the Judges' Retirement Law prospectively.
2. Adopt the Proposed Decision on Remand's ruling that Mast was not entitled to retire until he reached age 63.
3. Decline to adopt the Proposed Decision on Remand's ruling that the Judges' Retirement System (JRS) should not collect any overpayments that it previously made to Mast. Rather, the JRS should recover from Mast the overpayments the JRS made to him after December 29, 2011, with interest at 7% per annum, which totals \$21,504.73, as of March 1, 2017.

Factual Background

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

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

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

In an August 5, 1996 letter to counsel for the JRS, Mast wrote: "What then can I give as an inducement to resolve the claim? What I can give is complete and total confidentiality. At the present time, except for my wife, no one knows that I have made

this claim. I have not discussed it with friends, judges, former judges, or anyone else. As part of a settlement, I would commit to never discuss or disclose the claim or settlement with anyone.” At the end of the letter he wrote: “The window of opportunity to resolve the claim is ... very short and is now. In resolving the claim, CalPers [sic] is not acceding to my position and is not agreeing that my claim is valid. What CalPers [sic] 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.” He explained in another letter that he sent on the same day: “[M]y proposed resolution will save PERS and the State of California between 200 million and 400 million dollars ...”

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

Years later, even though Mast was receiving amounts that no other retired judge received, he claimed that the JRS was paying him too *little* under the settlement agreement. After writing several letters and emails to the JRS, Mast ratcheted up his efforts to obtain more money from the JRS. On September 1, 2010, he wrote letters to the JRS, the CalPERS Board members, the state Controller and the state Attorney General, explaining that he would continue to honor the confidentiality provision in the settlement agreement, but only if the JRS paid him over \$140,000 and an increased retirement allowance. If the JRS did not pay him the additional amounts he sought, he threatened the JRS with \$1 billion in liabilities.

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

The San Diego Superior Court dismissed Mast’s and Rossi’s case early in the proceedings. The Fourth District Court of Appeal unanimously affirmed the trial court’s judgment in *Staniforth v. Judges’ Retirement System* (2014) 226 Cal.App.4th 978 (*Staniforth I*). Mast and Rossi continued to pursue a small portion of the claims that the Court of Appeal had allowed to proceed past the JRS’ initial challenge, but those claims were then quickly dismissed by the San Diego Superior Court, and that judgment was unanimously upheld by the Fourth District Court of Appeal in *Staniforth v. Judges’ Retirement System* (2016) 245 Cal.App.4th 1442 (*Staniforth II*).

Mast’s Retirement Allowance

1. The Invalid Settlement Agreement

This case cuts to the very core of the Board’s fiduciary duties over the administration of the JRS. One of the cornerstone principles of those fiduciary duties is that the Board

may pay only those benefits that are authorized by law. That principle is always critical to this Board's mission, but it is particularly critical when one member receives benefits that no other members receive.

As one court explained: A retirement board "cannot fulfill [its] mandate unless it investigates applications and pays benefits only to those members who are eligible for them." *McIntyre v. Santa Barbara County Employees' Ret. Sys.* (2001) 91 Cal.App.4th 730, 734. More recently, another court explained:

The constitutional obligations ... do not permit the payment of benefits not otherwise authorized. Rather, the statutory scheme governs the scope of the benefits earned. Thus, while pension provisions should be broadly construed in favor of those who were intended to be benefited thereby, they cannot be construed so as to confer benefits on persons not entitled thereto. *Duarte v. State Teachers' Retirement System* (2014) 232 Cal.App.4th 370, 385.

This same principle has been the cornerstone of several appellate courts' rejections of CalPERS members' claims to excess benefits that CalPERS staff allegedly led the members to believe they were entitled to receive. Two recent examples are: *City of Pleasanton v. Board of Administration* (2012) 211 Cal.App.4th 522; *Chaidez v. Board of Administration* (2014) 223 Cal.App.4th 1425.

Further, the fact that Mast was able to convince a former CalPERS attorney that the JRS should avoid hundreds of millions of dollars of potential liability by paying him thousands of dollars of excess benefits does not change the analysis. It is well settled that contracts purporting to require a public retirement system to pay benefits in excess of those provided by law are not enforceable. In *Police Officers' Ass'n v. City of Pomona* (1997) 58 Cal.App.4th 578, 585, the court explained: "Statutory definitions delineating the scope of the Public Employees' Retirement System (PERS) compensation cannot be qualified by bargaining agreements." See also *Oden v. Board of Administration* (1994) 23 Cal.App.4th 194, 201 (same). The result is the same when the individuals purporting to grant benefits in excess of what is legally authorized are staff members of the retirement system. This is because "[t]he object of a contract must be lawful when the contract is made ..." Civ. Code 1596; see also *Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 871 ("Any purported contract to give appellants the pension benefits [in excess of those provided by law] was invalid ...") Further, "estoppel is barred where the government agency to be estopped does not possess the authority to do what it appeared to be doing." *Id.* at 870; *Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1608 ("While equitable relief is flexible and expanding, its power cannot be intruded in matters that are plain and fully covered by positive statute.")

In addition to the above California law, it must be remembered that CalPERS is a tax-qualified plan with the Internal Revenue Service (IRS), and one of the most fundamental principles to which CalPERS must adhere to maintain its tax qualification is to

administer JRS in accordance with its plan terms. This includes paying only those benefits that are authorized by law. Put simply, if Mast's theory of *Olson v. Cory* had been correct, then all JRS members should have been paid according to that theory. But, his theory was not correct (i.e. not in accordance with the plan terms), so neither he nor any other JRS member should have been paid according to that theory.

2. Mast's New Claim That He Should Have Been Able to Retire at Age 60

In this administrative appeal to the Board, Mast also raises a new claim that he should have been able to retire at age 60 instead of age 63. Government Code section 75033.5 provides: "No judge shall be eligible to receive an allowance pursuant to this section until the attainment of at least age 63 unless the judge is credited with 20 years of judicial service and has attained age 60." Mast had less than 20 years of service, so it is perfectly clear that he was not entitled to retire until age 63. The Administrative Law Judge correctly rejected Mast's unsupported interpretation of section 75033.5 and this Board should also reject it.

For these reasons, the Board should direct that the JRS should pay Mast the retirement allowance he is entitled to receive under the Judge's Retirement Law, and no more.

The Board's Broad Discretion to Recover Overpayments

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

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

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

In exercising its discretion, the Board should consider all of the facts and circumstances of this case. The basic financial aspects of this case are as follows:

1. The JRS overpaid Mast over \$170,000.
2. When accounting for interest, the loss to the JRS has been over \$500,000.

3. Mast currently receives a lawful monthly allowance of \$7,897.42 from the JRS (pending a final decision from the Board), which may be reasonably offset as part of an installment repayment plan.

Staff recommends that the Board order the JRS to collect the overpayments the JRS made to Mast after December 29, 2011, plus 7% per annum interest. It was by letter dated December 29, 2011, that the JRS informed Mast of its position that he was being overpaid. The overpayments continued to Mast after December 29, 2011, only because the JRS was awaiting the conclusion of the much more financially significant *Staniforth v. JRS* litigation (estimated by Mast to have \$1 billion at issue), before addressing Mast's much less financially significant individual benefit dispute.

Thus, had it not been for the frivolous litigation Mast initiated against the JRS, the JRS would have made the corrections to Mast's monthly allowance no later than December 29, 2011. Further, Mast cannot claim to have relied on any representation from the JRS that he was entitled to the overpayments made to him after he received the December 29, 2011 letter. Staff believes that the Board also has authority to collect some or all of the overpayments that the JRS made to Mast *before* December 29, 2011, but believes that its proposal for the recovery of overpayments made after December 29, 2011 is reasonable under all existing circumstances. The overpayments made to Mast after December 29, 2011, totaled \$17,911.57. With interest at 7% per annum running through March 1, 2017, Mast's payment obligation would be \$21,504.73.

Conclusion

Every neutral judicial officer who has reviewed Mast's theory that he advanced to obtain his unique benefit from the JRS has rejected that theory swiftly and soundly. This case was never a "close call." In *Olson v. Cory*, the California Supreme Court rejected the very legal theory that Mast claims it adopted. It is unfortunate that Mast's plan worked on a former attorney in the CalPERS Legal Office over 20 years ago, but the law is clear that the People of California, who are ultimately responsible for funding the JRS, should not have to continue paying for that mistake after it has been brought to the Board's attention. Thus, the Board should order that Mast receive benefits under the same terms as every other JRS member and collect the overpayments that the JRS made to him after December 29, 2011, plus 7% interest.

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