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PAGE 01

Judge Paul G. Mast (Ret.)



August 5, 1986

Maureen Rolly, Senior Staff Counsel
Public Employees Retirement System
Lincoln Plaza, 400 7th St.
Post Office Box 848707
Sacramento, CA 94226-2707



Via Fax: 916-323-3656

Re: In the Matter of the Application for Retirement from JRS of Paul G. Mast,
Respondent, and Central Orange County Judicial District, Municipal Court,
Respondent, Case No. [Redacted]

Dear Ms. Rolly:

Attached please find Points and Authorities which I will be filing and serving on you this week.

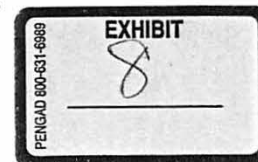
After researching the question again, and reading your Statement of Issues and your authorities, it is clear to me that my position is absolutely correct. If you put on your hat as advisor to PERS, instead of an advocate in opposition to my position, I am certain that you will agree with me.

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 can not understand why I have not heard from you before this time.

You will note from my proof of service that I am not serving the Orange County Central Municipal Court, as I can not see that they are involved in the case, but am serving the Judicial Council who you have named as a Respondent. You have done this opposite. If I am wrong and the Municipal Court should be served, please advise me.

Very truly yours,

Paul G. Mast
Paul G. Mast



1 **PAUL G. MAST**
2 **Attorney at Law**
3 [REDACTED]

4 **Respondent**

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6
7 **BOARD OF ADMINISTRATION**
8 **PUBLIC EMPLOYEE'S RETIREMENT SYSTEM**
9

10 **In the Matter of the Application**
11 **for Retirement from JRS of**

12 **PAUL G. MAST,**

13 **Respondent,**

14 **and**

15 **JUDICIAL COUNCIL OF**
16 **CALIFORNIA**

16 **Respondent.**

CASE NO. [REDACTED]

OAH NO. L-9605311

RESPONDENT'S RESPONSE TO
STATEMENT OF ISSUES AND
POINTS AND AUTHORITIES

17
18 Paul G. Mast, Respondent respectfully submits this Response to Statement of Issues
19 and Points and Authorities.

20 **INTRODUCTION**

21 Respondent, Paul G. Mast, a Municipal Court Judge, began his third term of office on
22 January 8, 1975. Respondent retired during the pendency of said term on January 15, 1979.

23 Respondent's retirement benefits were deferred until [REDACTED] May 28,
24 1995. The claim which precipitated this proceeding was filed in June 1994, prior to
25 Respondent receiving any retirement benefits.

26 Pursuant to the ruling in *Olson v. Cory* (1980), 27 Cal. 3d 532, 164 Cal.Rptr. 217,
27 Respondent's pension rights vested in accordance with the law as it existed at the time he
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1 took office on his final term, i.e. January 6, 1975. Respondent has requested that his pension
2 rights be so calculated. Petitioner has refused.

3 **STATEMENT OF ISSUES**

4 Respondent agrees with Petitioner's Statement of Issues, except in three instances,
5 the first two of which do not seem material.

6 1. Respondent initially assumed office and joined the Judges Retirement System on
7 November 6, 1965 (not November 1).

8 2. On January 15, 1975, during Respondent's last term, Respondent did not "resign" from
9 office, but "retired" from office.

10 3. Petitioner indicates in Note 6, "In earlier communications with respondent, JRS
11 informed him that judges who still served after the amendment of section 68203, received
12 additional compensation. This was designed as a 'comparable new advantage' to offset the
13 impairment."

14 Respondent did not receive such a communication from JRS, but did receive an
15 inquiry as to whether he received any compensation subsequent to *Olson v. Cory*, supra.
16 *Olson v. Cory* concerned two matters, the question of whether salary rights of certain judges
17 were vested and the question of whether pension rights of these same judges were vested.
18 The Supreme Court determined that both were vested for judges who assumed office prior to
19 January 1, 1977. The Controller of the State of California, having previously refused to pay
20 judges any amount in excess of that authorized by the law as enacted and effective January
21 1, 1977, subsequent to *Olson v. Cory*, and in accordance with the order of the Supreme
22 Court in that case, paid to those judges who had begun their term of office prior to January 1,
23 1977, and whose rights were thus vested, the balance of their salary which had been
24 withheld from them. Respondent did receive that back pay which amounted to a very few
25 hundreds of dollars. Said sum was received in 1980 or 1981. Respondent does not have a
26 memory of or any records to indicate the exact amount received.
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1 Respondent never received any money or other compensation designed as "a
2 comparable new advantage" to offset the impairment to his pension rights, nor did he ever
3 waive any pension rights.

4 Further, The Controller of the State of California can not pay money not authorized by
5 law, and could not have paid "additional compensation" designed as a "comparable new
6 advantage" to offset an impairment, unless such payment was authorized by the legislature
7 by statute or the people by initiative or referendum. No such law was ever enacted and no
8 such payment was ever authorized.

9 In addition, this issue was addressed by the Supreme Court in *Olson v. Cory* which
10 specifically holds that there was no "comparable new benefit", when it states at page 541,
11 "Such modification of pension benefits works to the disadvantage of judicial pensioners by
12 reducing potential pension increases, and *provides no comparable new benefit*"
13 [emphasis supplied].
14

15 **POINTS AND AUTHORITIES**

16 Respondent's pension rights are vested in accordance with Government Code
17 section 68203 as it existed on January 6, 1975

18 The California Legislature amended, effective January 1, 1977, Government Code,
19 Section 68203, limiting annual cost of living increases to judicial salaries to a maximum of
20 five percent. Prior to the enactment, judicial salaries increased in accordance with the cost of
21 living increases without a maximum limitation.
22

23 The Supreme Court, in *Olson v. Cory*, supra, ruled that said amendment was
24 unconstitutional on the grounds that it impaired vested contractual rights in violation of the
25 United States Constitution, stating that salaries of elected state officers may not be reduced
26 during their term of office. The Supreme Court stated that the ruling applied to any judge who
27 served any portion of his term prior to January 1, 1977, and as to judicial pensioners
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1 whose benefits were based on the salary for the office of such a judge. Judicial pensioners
2 are the judge and widows and orphans of the judge who also have pension rights.

3 The Supreme Court also clearly stated that a judge who completes a "protected term"
4 [a "protected term" is a term that began between January 1, 1970 and December 31, 1976]
5 and voluntarily embarks upon a new term can thereafter no longer claim to serve in a
6 "protected term." Respondent does not fall within that category as he did not complete his
7 "protected term" nor did he embark upon a new term, inasmuch as he retired January 15,
8 1979, prior to the expiration of his "protected term", January 1, 1981.

9 The Supreme Court states that once vested, the rights can not be taken away, at page
10 538:

11 Once vested, the right to compensation cannot be eliminated without
12 unconstitutionally impairing the contract obligation. . . .

13 In the instant case the Legislature in 1969 adopted the full cost-of-living
14 increase provision, binding the state to pay persons employed at the
15 represented compensation for their terms of office.

16 Prior to the 1976 amendment judges had a vested right not only to their
17 office for a certain term but also to an annual increase in salary equal to the full
18 increase in the CPI during the prior calendar year.

19 On page 539 the Supreme Court states that the rights are contract rights applying to
20 judges who served any part of his term during the 1970 to 1977 period (the "protected term"),
21 and extends to the end of said term:

22 A judge entering office is deemed to do so in consideration of - at least in
23 part - salary benefits then offered by the state for that office. If salary benefits are
24 diminished by the Legislature during a judge's term, . . . the judge is
25 nevertheless entitled to the contracted-for benefits during the remainder of such
26 term. The right to such benefit accrues to a judge who served during the period
27 beginning 1 January 1970 to 1 January 1977, whether his term of office
28 commenced prior to or during that time period.

29 In regard to judicial pensioners, the Supreme Court states that judicial pensioners
30 have the same vested rights as the sitting judge during the "protected term" at pages 540
31 through 542:

32 The 1976 amendment, in addition to impairing the vested rights of judges
33 in office, also impairs those of judicial pensioners. A long line of this court's

1 decisions has reiterated the principle that a public employee's pension rights
2 are an integral element of compensation and a vested contractual right accruing
3 upon acceptance of employment . . . any changes in a pension plan which result
4 in disadvantage to employees should be accompanied by comparable new
advantages. Since no new comparable or offsetting benefit appeared in the
modified plan,, we held the 1976 statute unconstitutionally impaired the
pensioner's vested rights. . . .

5 . . . The salary for such a judicial office - if the retired or deceased judge
6 served in office during the period 1970 to 1977 - was covenanted to increase
7 annually with the increase in CPL. The 1976 limitation on increases in judicial
8 salaries is, in turn, calculated to diminish benefits otherwise available to those
9 judicial pensioners. Such modification of pension benefits works to the
10 disadvantage of judicial pensioners by reducing potential pension increases,
11 and provides no comparable new benefit. Again we conclude that defendants
12 have failed to demonstrate justification for impairing these rights or that
13 comparable new advantages were included and that section 6802B as
amended is unconstitutional as to certain judicial pensioners.

14 Contractually, each judicial pensioner is entitled to some fixed
15 percentage of the salary payable to the judge holding the particular judicial
16 office to which the retired or deceased judge was last elected or appointed.
17 [citations omitted] Accordingly, a judicial pensioner cannot claim impairment of
18 a vested right arising out of the 1976 amendment except when the judge
19 holding the particular judicial office could also claim such an impairment.

20 Thus, the pension rights of a judge who retired during a "protected term" were vested
21 for all time, the same as his or her salary was protected by his or her vested rights until such
22 time as said judge retired during the "protected term".

23 In this case, Respondent was a judge holding such a particular judicial office, a
24 "protected term", in that his term began January 6, 1975, which was within the window period
25 of 1970 to 1977. His pension rights were forever vested by the fact that he retired during the
26 "protected term" on January 15, 1979, prior to the expiration of his "protected term". Said
27 "protected term" would have expired January 1, 1981, had Respondent not previously retired.
28 The fact that Respondent was serving in such a "protected term" and had such vested rights
was further confirmed by the State Controller's office when Respondent was paid the
withheld arrearages to his salary in 1980 or 1981.

The Supreme Court further emphasizes the different treatment to be accorded the
group of judges Respondent falls in (those with "protected terms") from another group of
judges, stating at page 542:

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Judicial pensioners whose benefits are based on judicial services terminating while section 68203 provided for unlimited cost-of-living increases in judicial salaries [Respondent was in this class where the Court held in the *Oison v. Cory* case that section 68203 provided for unlimited cost-of-living increases until the end of Respondent's term that began January 8, 1975], acquired a vested right to a pension benefit based on some proportionate share of the salary of the judge or justice occupying the particular judicial office including the incumbent judge's or justice's unlimited cost-of-living increases.

The Supreme Court states that if a judge embarks on a new term after December 31, 1976 (which Respondent did not do), then his future salary and his pension rights are governed by the 1976 Amendment to Section 68203 on page 542:

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 of judicial pensioners based on the salaries of such judges will be governed by the 1976 amendment.

The conclusion of the Supreme Court is on page 546:

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, . . . 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.

No comparable new benefit

The Petitioner in its Statement of Issues, infers that there may have been some "comparable new benefit" received by Respondent which would offset his vested pension rights. The Supreme Court in *Oison v. Cory* specifically holds that there was no "comparable new benefit", when it states at page 541, "Such modification of pension benefits works to the disadvantage of judicial pensioners by reducing potential pension increases, and *provides no comparable new benefit* [emphasis supplied].

Other issues raised by Petitioner

In an effort to defeat Respondent's valid claim, Petitioner sets forth other issues which are specious and do not apply to the issues before this tribunal.

1 Petitioner states on page 5 at line 3 of the Statement of Issues that the Chief Executive
2 Officer [who is the Petitioner in this matter] finds that sections 75033.5 and 68203 are closely
3 related, and by his reasoning this means that since section 75033.5 was not amended in
4 1976, a judicial pensioners rights were not vested as stated by the Supreme Court. The
5 Supreme Court has ruled on this issue, and the ruling is *res judicata*.

6 Not only was section 75033.5 in existence at the time of the 1976 amendment to
7 section 68203 and thereafter, but it was considered by the Supreme Court in *Olson v. Cory*,
8 and cited therein. In this regard the Supreme Court states as follows:

9 Contractually, each judicial pensioner is entitled to some fixed
10 percentage of the salary payable to the judge holding the particular judicial
11 office to which the retired or deceased judge was last elected or appointed (See
12 e.g., Gov. Code, §§ 75032, 75033.5 [emphasis supplied] Accordingly, a
13 judicial pensioner cannot claim impairment of a vested right arising out of the
14 1976 amendment except when the judge holding the particular judicial office
15 could also claim such an impairment.

16 Petitioner also states on page 5 at line 21, "Based on these principles of construction,
17 the Chief Executive Officer [the Petitioner] has determined that the Legislature did not intend
18 to "grandfather" judges . . ." This statement may be true, but it only exhibits the lack of
19 understanding that the Petitioner Chief Executive Officer has of *Olson v. Cory*. The holding
20 in *Olson v. Cory* is that the 1976 Amendment to Section 68203, which exhibits the
21 Legislative intent, was unconstitutional as applied to Respondent and the class of judges in
22 which Respondent falls.

23 Next, Petitioner states at page 5, line 14, "The long-standing interpretation of a statute
24 by the agency entrusted with its implementation will be given weight by the courts." In support
25 of this proposition Petitioner cites *Neely v. Board of Retirement*, (1974) 36 C.A.3d 815, 111
26 Cal.Rptr. 841, and *City of Sacramento v. Public Employees Retirement System*, (1991) 229
27 CaLApp.3d 1470, 280 Cal. Rptr. 847. The cases do not stand for what Petitioner cites them
28 for, but even if they did, the interpretation of the Petitioner Chief Executive Officer cannot

1 over-rule the California Supreme Court no matter how long he applied the erroneous
2 interpretation.

3 In regard to the *Neely* case, the Board of Retirement held an administrative hearing,
4 after which the Board of Retirement made a determination. This is the procedure in which this
5 Tribunal is now engaged in. After a decision is made in this matter, the decision of this
6 Tribunal will be given great weight. That is all that *Neely* says. In the instant case,
7 Respondent before this time has not been given an administrative hearing and no
8 determination has been made.

9 In addition, after stating that the Board of Retirement's decision will be given great
10 weight, the Court proceeds to discuss all the issues and the meanings of the words and
11 decides the case itself.

12 In the *Neely* case, the question was one of interpretation of the meaning of words in a
13 statute. It was not the interpretation of the constitutionality of a law passed by the legislature.
14 With all due respect, the Petitioner Chief Executive Officer is not as qualified as the Supreme
15 Court to rule on the constitutionality of an act of the Legislature, and in the instant case is not
16 in a position to over-rule the stated decision of the Supreme Court.

17 Likewise in the *City of Sacramento* case, the Court held that the *Board of*
18 *Administration's* [emphasis supplied] interpretation of the Public Employees' Retirement
19 Law (Gov. Code, §20000 et seq.) is to be accorded great weight unless clearly erroneous.
20 The Court further states, however, that where the material facts are not disputed and the
21 question involves only the interpretation and application of the act, a question of law is
22 presented on which the appellate court must make an independent determination.

23
24 In the instant case, the material facts are not in dispute. The question involves only the
25 interpretation and application of the law. A question of law is thus presented upon not only
26 the appellate court, but also this Tribunal must make an independent determination.
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WHEREFORE, Respondent respectfully requests that an order be made upholding his claim and confirming his vested pension rights.

Respectfully submitted,

August 16, 1988

Paul G. Mast
Respondent

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I reside in the aforesaid County, State of California. I am over the age of eighteen years and not a party to the within action. My residence address is [REDACTED]

[REDACTED] On August 19, 1998. I served the foregoing RESPONSE TO STATEMENT OF ISSUES AND POINTS AND AUTHORITIES on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope with postage fully prepaid, in the United States Mail at Palm Springs, California,

addressed as follows:
Office of Administrative Hearings
314 W. First St.
Los Angeles, CA 90012

Kayla J. Gillan, Deputy General Counsel
Maureen Reilly, Senior Staff Counsel
Public Employees Retirement System
Lincoln Plaza, 400 "P" St.
Post Office Box 942707
Sacramento, CA 94229-2707

Judicial Council of the State of California
303 Second St.
South Tower
San Francisco, CA 94107

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August 19, 1998

Marci Mast