



1 PAUL G. MAST (CA Bar No. 28390)

2 [REDACTED]
3 Telephone: [REDACTED]
4 Email: [REDACTED]

5 Respondent

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8 **BOARD OF ADMINISTRATION**
9 **CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**

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11 In the matter of the Amount of Proper)
12 Benefits Payable to)
13 PAUL G. MAST, Judge, Ret.)
14)
15)
16)
17)
18)

AGENCY CASE NO. 2010-0825

OAH NO. 2015-030996

**POINTS AND AUTHORITIES
MOTION TO STRIKE**

Hearing Date: November 30, 2015
Hearing Location: Los Angeles, CA

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**PETITIONER IS NOT PERMITTED TO RE-LITIGATE THE ISSUES
THAT WERE CONTAINED IN THE PROCEEDINGS IN 1996 THAT
RESULTED IN THE SETTLEMENT AGREEMENT**

In paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of its Statement of Issues, Petitioner seeks to rescind the Settlement Agreement between the parties entered into in 1996 and re-litigate the prior case [REDACTED] OAH No. L-9605311. This case was settled pursuant to the Settlement Agreement (Exhibit O, page 5) in 1996 and cannot be rescinded or re-litigated here.

Prior to his 63rd birthday Respondent advised Petitioner that he was entitled to cost-of-living adjustment (COLA) increases on his deferred retirement benefits (Exhibit W). Petitioner denied that Respondent was entitled to COLA increases on his deferred retirement benefits; Respondent filed a claim; Petitioner responded with a determination letter denying the claim; Respondent filed an appeal; and the matter was referred to the Office of Administrative Hearing for determination in 1996, CASE NO.: [REDACTED] OAH No. L-9605311.

In the 1996 Administrative Hearing JRS filed a Statement of Issues (Exhibit N page 1). Respondent filed a Response to Statement of Issues and Points and Authorities (Exhibit N page 8).

Respondent received a letter dated September 20, 1996 from Maureen Reilly, Senior Staff Counsel (Exhibit O page 1), which states in part, "This is to confirm in writing, that the Judges' Retirement System (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."

Respondent's letter of August 5, 1996 (Exhibit O page 2) states in part:

**Judicial pensioners whose benefits are based on judicial services
terminating while section 68203 provided for unlimited**

cost-of-living increases in judicial salaries, 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 judge's or justice's unlimited cost-of-living increases.**

Ms. Reilly stated in her reply letter that the position of Respondent as stated in his brief and in the letter of August 4, 1996 was adopted. The parties agreed that COLA increases were to be paid to Respondent retroactive to the beginning of the time of his receiving deferred retirement benefits and thereafter, with regular benefits and increases paid monthly beginning January 1, 1997.

A retroactive payment was made for the balance of the COLA adjusted monthly benefits for the period after May 28, 1995 to December 31, 1996. Beginning January 1997 COLA monthly benefits in accordance with the calculations of JRS were made. (Benefit payments for the month are paid on the last day of the month.) No interest was paid on the unpaid benefits between May 28, 1995 and the date of the retroactive payment of those benefits. In accordance with Civil Code §3290 interest for this retroactive payment has been waived.

The parties entered into a written Settlement Agreement (Exhibit O, page 5), which was drafted entirely by Petitioner without consultation with Respondent.

Petitioner computed the COLA for the entire period from 1979 to January 1, 1997 without consultation or input from Respondent. Petitioner did not submit the calculations to Respondent for approval. Although Respondent never saw Petitioner's calculations, Respondent accepted the calculations, and they became an inherent part of the Settlement Agreement.

The initial amount of deferred retirement benefits (January 1997) paid to Respondent was \$5,893.83 (Exhibit P page 1). Page 1 of Exhibit P is a letter from Jim Niehaus of JRS which states that for the first six months of 1997 the benefits were erroneously paid at \$5,720.08 and that a catch up payment was being made

to bring the amount of the benefits paid for the period to \$5,893.83 per month. This is confirmed by a schedule provided by Petitioner (Exhibit P page 2). The schedule lists all the benefits received by Respondent from May 1995 until April 2010. Respondent has confirmed that the schedule is correct. The schedule of benefits received reveals that from January 1997 until the time JRS stopped making COLA to the benefits, *infra*, the COLA was made effective January of each year instead of September of each year as dictated by GC §68203.

Civil Code Section 1523 provides:

Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction.

Said attempt by JRS to recalculate ab initio the monthly benefits [benefits] which were recalculated by JRS prior to creation of the 1996 Settlement Agreement is unlawful in that the agreed upon amounts and subsequent Settlement Agreement were an Accord and Satisfaction; any such recalculation is barred on the grounds of the rules governing rescission of agreements, laches, and estoppel.

A party wishing to rescind an agreement must use reasonable diligence to rescind promptly when aware of his right and free from undue influence or disability.

A portion of California Civil Code Section 1691 addresses the issue of timeliness as follows:

... to effect a rescission a party to the contract must, promptly [emphasis added] upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence or disability and is aware of his right to rescind. . .

The Court in *Gestad v. Ellichman* (124 Cal.App.2d 831, 269 P.2d 661, April

29, 1954) said:

Section 1691, Civil Code, requires the party who wishes to rescind an agreement to use reasonable diligence to rescind promptly when aware of his right and free from undue influence or disability. In such a suit acting promptly is a condition of his right to rescind, *Victor Oil Co. v. Drum*, 184 Cal. 226, 243, 193 P. 243; *Neff v. Engler*, 205 Cal. 484, 488, 271 P. 744, and therefore diligence must be shown by the actor whereas in other actions laches is an affirmative defense to be alleged by the defending party. Absence of explanation of delay may even cause a complaint for rescission to be demurable. *Bancroft v. Woodward*, 183 Cal. 99, 109, 190 P. 445. A delay of more than one month in serving notice of rescission requires explanation. *Campbell v. Title Guarantee Etc. Co.*, 121 Cal.App. 374, 377, 9 P.2d 264. The diligence is required throughout and it applies as well to the time a person will be held aware of his right to rescind as to the time he will be held to have discovered the facts on which that right is based. *Bancroft v. Woodward*, supra, 183 Cal. 99, 108, 190 P. 445; *First Nat. Bk. v. Thompson*, 212 Cal. 388, 401, 298 P. 808. In the instant matter JRS had full knowledge of the facts, had full knowledge of the appropriate CPI, had full knowledge of the law, and had the ability at any time to recalculate the retirement benefits. The failure to do so for fifteen years clearly precludes their ability to rescind or attack the Settlement Agreement. As stated above the Settlement Agreement incorporated the calculations of the retirement benefits and arrearages that were integral to the Settlement Agreement. . . .

CHANGING THE SETTLEMENT AGREEMENT IS BARRED BY LACHES

The principle of laches is an equitable doctrine that recognizes the necessity of the finality and sanctity of agreements. The courts have held uniformly that even relatively short delays in seeking to rescind or change an agreement is barred by laches. In the case of *Fabian* (infra), following, three years after the agreement and one and one-half years after the party was put on 'inquiry' the party attempted to rescind, the Court held that

rescission was barred by laches. The 1996 Settlement Agreement was created nineteen years ago.

Petitioner argues that it wants to rescind the agreement; it wants recalculate the amount due under the Settlement Agreement. This would be wrong. The calculation done by JRS in 1996 was both part and parcel of the Settlement Agreement and the underlying factor of the entire Settlement Agreement. To recalculate is to destroy the essence of the Settlement Agreement. It is therefore an attempt to rescind the Settlement Agreement.

As shown in *Fabian*, it is not material and should not be considered whether Respondent was prejudiced by the nineteen-year delay. "To bar an action for rescission on the ground of laches it is unnecessary to show that the defendants were prejudiced by the delay." *Fabian v. Alphonzo E. Bell Corp.*, 55 Cal.App.2d 413, 415, 130 P.2d 779, 781. In the *Gestad* case the complaint dated and filed July 9, 1951, alleges that plaintiff disavows and rescinds the agreement 'hereby' which causes the rescission to be nearly three years after the agreement and more than one and one-half years after she had shown by her letter to have been put on inquiry. *Gestad v. Ellichman et al, supra*.

Respondent's Retirement Benefits were annually adjusted (although not always in a timely manner) in accordance with the Settlement Agreement until approximately 2003.

ATTACKING THE SETTLEMENT AGREEMENT IS BARRED BY ESTOPPEL.

The California Evidence Code Section 623 states:

Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

In the instant case, during the conduct of the discussion prior to the Settlement Agreement JRS led Respondent to believe that they would calculate the amount of the COLA for Settlement Agreement. This constitutes statements and conduct as stated in the Code Section. As such, JRS is now estopped from claiming that the calculations of the Retirement Benefits were incorrect. This includes those calculations that are part and parcel of and incorporated into the Settlement Agreement as well as those calculations that were the basis for subsequent years. JRS is not permitted to change or contradict the Settlement Agreement, or the calculations that were the basis of it because estoppel applies. . . .

Respondent does not know, and was not advised by JRS of what starting salary was used for the calculations. Whatever it was, Respondent and JRS are bound by the amount used by JRS in 1996 during the settlement negotiations and in the Settlement Agreement for the reasons previously stated.

CALIFORNIA GOVERNMENT CODE SECTION 20160 PRECLUDES CHANGES IN THE 1996 SETTLEMENT AGREEMENT AND IN ANY PRIOR CALCULATIONS

California Government Code Section 20160 provides in pertinent parts:

(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.** [Emphasis added]

(2) . . .

(3) . . .

(b) . . . board shall correct all actions taken as a result of errors or omissions of . . . this system.

In a letter dated May 4, 2011, Pamela Montgomery states, "GC

Section 20160 (b) requires that we correct all errors made by the System.' She overlooked that GC §20160 (a)(1) precludes any such correction under any circumstances **at this time** (more than six months after discovery of this right).

Ms. Montgomery cited Government Code Section 20160 as her basis for attacking the Settlement Agreement and recalculating the benefits *ab initio*. Nothing in this section would give JRS the right or ability to overrule, attack, abandon, or recalculate The Settlement Agreement. In the instant case, if there is any reason to look at Government Code Section 20160, there is no reason to look beyond (a)(1). Even if there were any calculation errors as Ms. Montgomery contends, no changes may be made.

Government Code section 20164(b)(1) provides a the three-year limitations period for the adjustment of errors or omissions made by the Judges' Retirement System, or where the Judges' Retirement System makes an erroneous payment to a member or beneficiary, as follows:

(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.

Thus, if JRS made any errors in calculating the COLA or the initial amount of benefits due in January 1997, JRS had three years to correct any such errors. Three years has long since passed.

Respondent incorporates Respondent's Trial Brief herein.

CONCLUSION

Petitioner is precluded from litigating the same issues that were present in the litigation in 1996 and which resulted in the Settlement Agreement between the parties. The Motion to Strike the paragraphs in the Statement of Issues should be granted.

Respectfully submitted
November 20, 2015

Paul G Mast

Paul G. Mast



STATEMENT OF ISSUES AND RESPONSE
1996
EXHIBIT N

1 KAYLA J. GILLAN, DEPUTY GENERAL COUNSEL
MAUREEN REILLY, SENIOR STAFF COUNSEL
2 PUBLIC EMPLOYEES' RETIREMENT SYSTEM
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4 Telephone: (916) 558-4097

5 Attorney for Petitioner

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7 BOARD OF ADMINISTRATION
PUBLIC EMPLOYEES' RETIREMENT SYSTEM

8	In the Matter of the Application)	CASE NO. [REDACTED]
9	for Retirement from JRS of)	
10	PAUL G. MAST,)	OAH NO. L-9605311
11	Respondent,)	STATEMENT OF ISSUES
12	and)	
13	JUDICIAL COUNCIL OF CALIFORNIA,)	
14	Respondent.)	

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16 Petitioner James E. Burton, Chief Executive Officer of the
17 Public Employees' Retirement System (PERS), states:

18 I

19 Petitioner makes and files this Statement of Issues in his
20 official capacity as such and not otherwise.

21 II

22 Respondent Paul G. Mast (respondent) became a member of the
23 Judges' Retirement System (JRS) on November 1, 1965, following
24 his appointment to the Municipal Court in the Central District of
25 Orange County. He was appointed to an unexpired six-year term,
26 which ended in 1968. He was elected to two subsequent terms,
27 taking his last oath of office on January 6, 1975. Mast did not
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1 complete his last full term, but instead, resigned from office.

2 In connection with his resignation, respondent elected a
3 "deferred retirement" under Government Code section 75033.5.¹
4 His actual retirement date was May 28, 1995. His benefits were
5 calculated at the rate of 49.4752%, based on the incumbent
6 officeholder's salary.²

7 III

8 Beginning in June 1994, respondent informed JRS that he had
9 "vested rights" to benefits calculated at 49.4752% of his own
10 salary on the date he resigned, and then escalated by a cost-of-
11 living adjustment (COLA) for each year until his actual date of
12 retirement.³ This definition of compensation was authorized by
13 former section 68203.

14 Section 68203 was amended on January 1, 1977 to eliminate
15 the escalation clause. (Stats. 1976, ch. 1183.) After the
16 amendment, judges became entitled to benefits calculated at
17 49.4752% of the incumbent officeholder's salary.⁴

18 IV

19 In letters dated July 10, 1994 and May 1, 1995, respondent
20 explained his "vested rights" theory in detail, relying

21 _____
22 ¹ All statutory references are to the Government Code.

23 ² Respondent's allowance was also based on a total of 13
years and two months in service credit, which is not in dispute.

24 ³ Respondent is the last judge whose benefits were based on
25 service during the time period the old law was still in effect.
In this letter, he offers an interpretation of Olson that would
26 make his re-calculation administratively feasible by JRS. His
27 suggestions of how JRS could grant his request, but avoid the
need to re-calculate the allowance of other judicial pensioners,
are not ripe for the purposes of this appeal.

28 ⁴ The monthly retirement allowance is also adjusted with an
annual COLA, which is not in dispute.

1 principally on the ruling in Olson v. Cory (1980) 27 Cal.3d 532
2 [164 Cal.Rptr. 217].⁵ (See letter at Exhibit 1.) He asked JRS
3 to re-calculate his allowance using the definition of
4 compensation in former section 68203, as in effect on December
5 31, 1976. JRS had calculated Respondent's allowance based on the
6 deferred retirement formula in Section 75033.5, incorporating the
7 new definition of compensation in section 68203 as amended on
8 January 1, 1977.

9 V

10 JRS denied respondent's request on May 15, 1995.⁶ (See
11 letter at Exhibit 2.) Respondent filed a timely appeal. (See
12 letter of May 26, 1995 at Exhibit 3.) His appeal was
13 acknowledged and this hearing scheduled accordingly, before the
14 PERS Board of Administration (Board).⁷

15 VI

16 The only disputed issue concerns which definition of
17 compensation must be used by JRS to calculate the retirement
18 benefits now payable to respondent. Nevertheless, a hearing has
19 been scheduled, for the purpose of allowing PERS to present
20 testimony concerning its long-standing interpretation of the JRL.

21

22 ⁵ This is the first in a series of three rulings by the
23 High Court, following the amendment of section 68203. The two
24 later rulings are not pertinent here, and we refer to the ruling
as originally published on March 27, 1980.

25 ⁶ In earlier communications with respondent, JRS informed
26 him that judges who still served after the amendment of section
27 68203, received additional compensation. This was designed as a
"comparable new advantage" to offset the impairment. (See Betts,
infra, at p. 864.) Respondent claims that he only received \$200,
by way of a technical salary adjustment.

28 ⁷ The 13-member board administers JRS as well as the Public
Employees' Retirement System (PERS). (See sec. 75005.)

1 If the parties stipulate to the introduction of such evidence,
2 this matter could proceed by written record.⁸ If so, then JRS
3 will also introduce a declaration, and such other evidence as the
4 parties may stipulate.

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6 VII

6 Under the deferred retirement provisions of section 75033.5,
7 a judge is deemed retired even though he or she cannot receive
8 benefits until reaching the minimum retirement age.⁹ This
9 statute is excerpted in pertinent part below:

10 "75033.5. Notwithstanding any other provision of
11 this chapter, any judge . . . may retire, . . . (and)
12 after reaching the age which would have permitted him
13 or her to retire for age and length of service under
14 section 75025 . . . , receive a retirement allowance
15 based upon the judicial service . . . , with which he
16 or she is credited, in the same manner as other judges,
17 . . . (and) the retirement allowance is an annual
18 amount equal to 3.75 percent of the compensation
19 payable, at the time payments of the allowance fall
20 due, to the judge holding the office which the retired
21 judge last held" (Emphasis added.)

17 The deferred retirement procedure was enacted on January 1,
18 1974. (Stats. 1973, ch. 1102.) In other words, it was existing
19 law when the Legislature was debating the amendment to section
20 68203 during the 1976 session.

21 VIII

22 It is well-accepted that statutes in pari materia must be
23 construed together, to promote harmony and avoid a repeal by
24 implication. (Oden v. Board of Administration (1995) 23 Cal.App.

25
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27 ⁸ Under the Administrative Procedure Act, the Board may
28 proceed on the Statement of Issues without a hearing. (Sec.
11505(b); see sec. 11504.5.)

⁹ See sec. 75025 for linkages of age and service credit.

1 4th 194, 202 [28 Cal.Rptr.2d 388]; Rosenthal v. Cory (1977) 69
2 Cal.App.3d 950, 953 [148 Cal.Rptr. 442].)

3 The Chief Executive Officer finds that sections 75033.5 and
4 68203 are closely related, as applied to judges who elected a
5 deferred retirement. He finds, the definition of compensation in
6 new section 68203 is harmonious with the same definition in
7 section 78203. He also finds, the definition in old section
8 68203 would be superseded by the "notwithstanding clause" in
9 section 78203 for judges who elected a deferred retirement.¹⁰
10 However, the rule of liberal construction cannot furnish a
11 pretext to create a liability where none exists or appears to
12 have been intended. (Neeley v. Board of Retirement (1974) 36
13 Cal.App.3d 815, 822 [111 Cal.Rptr. 841].)

14 The long-standing interpretation of a statute by the agency
15 entrusted with its implementation will be given great weight by
16 the courts. (Neeley, supra, at p. 820; City of Sacramento v.
17 PERS (1991) 229 Cal.App.3d 1470, 1478 [280 Cal.Rptr. 847].) The
18 Board has always interpreted the JRL as providing for the
19 retirement allowance to be based on the salary of the current
20 office holder at the time the payment is due.

21 Based on these principles of construction, the Chief
22 Executive Officer has determined that the Legislature did not
23 intend to "grandfather" judges who elected a deferred retirement
24 so that their benefits could be calculated against their own last
25 salary plus COLAs under former section 68203. Rather, he finds,
26 the Legislature's intent was to leave intact the definition of

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28 ¹⁰ Pension laws are to be liberally construed. (Rosenthal,
supra, at p. 954.)

1 "compensation" in section 75033.5, which is also harmonious with
2 new section 68203. If it had intended otherwise, the Legislature
3 could have made this clear when it amended section 68203 in 1976,
4 when it defined compensation as the incumbent salary sans COLA.

5 IX

6 In Olson, the Court revisited its analysis of "the elements
7 of compensation" that vest as a contractual right, which it had
8 set forth in the seminal Betts v. Board of Administration (1978)
9 21 Cal.3d 859, 863 [148 Cal.Rptr. 158].¹¹ With one dissent, the
10 Olson panel ruled that judges who served in office before the new
11 law took effect had a "vested right" to the calculation of
12 benefits under the old law. (Olson, supra, at p. 532.)

13 The Court extended its vesting theory to "judicial
14 pensioners"¹² on "a pro rata basis, as shown in the following
15 excerpt from page 533 of the Olson decision:

16 "Contractually, each judicial pensioner is
17 entitled to some fixed percentage of the salary payable
18 to the judge holding the particular judicial office to
19 which the retired or deceased judge was last elected or
20 appointed. [Citations to statute omitted.]
21 Accordingly, a judicial pensioner cannot claim
22 impairment of a vested right arising out of the 1976
23 amendment except when the judge holding the particular
24 judicial office could also claim such an impairment.
25 The resolution of pensioner vested rights, then, is
26 dependent on the foregoing resolution of judges' vested
27 rights left unimpaired by the 1976 amendment." (Bold
28 emphasis added.)

23 Olson does not distinguish judicial pensioners from those
24 judges who elected a deferred retirement under section 75033.5.

25 / / /

26 / / /

27 ¹¹ See Olson, supra, at fn. 3.

28 ¹² Id., at fn. 5.

1 However, such a distinction is intrinsic in its analysis:

2 "Judicial pensioners whose benefits are based on
3 judicial service terminating between 31 December 1969
4 and 1 January 1977 acquired a vested pension benefit
5 based on the salary of a judge occupying a particular
6 judicial office. That salary . . . included an
7 unlimited cost-of-living increase. As in the case of a
8 judge . . . , a judicial pensioner is entitled to his
9 proportionate share of the salary of the judge holding
10 the office to which the retired . . . judge was last
11 elected . . . , including a proportionate share of
12 cost-of-living increases to such salary of the
13 incumbent judge." (Olson, *supra*, at p. 533.)

14 X

15 For the reasons set forth above, it is the determination of
16 the Chief Executive Officer that respondent is not entitled to
17 benefits calculated at 49.4572% of his own last salary with
18 COLAs. The Chief Executive Officer respectfully requests that
19 the current calculation methodology of JRS be upheld.

20 BOARD OF ADMINISTRATION
21 PUBLIC EMPLOYEES' RETIREMENT SYSTEM
22 JAMES E. BURTON, CHIEF EXECUTIVE OFFICER

23 Dated: 7-29-96

24 BY Sandra C. Lund
25 SANDRA C. LUND
26 ASSISTANT EXECUTIVE OFFICER

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PAUL G. MAST
Attorney at Law
[REDACTED]
[REDACTED]
Respondent

**BOARD OF ADMINISTRATION
PUBLIC EMPLOYEE'S RETIREMENT SYSTEM**

In the Matter of the Application
for Retirement from JRS of
PAUL G. MAST,
Respondent,
and
**JUDICIAL COUNCIL OF
CALIFORNIA**
Respondent.

CASE NO. [REDACTED]
OAH NO. L-9605311
**RESPONDENT'S RESPONSE TO
STATEMENT OF ISSUES AND
POINTS AND AUTHORITIES**

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

INTRODUCTION

Respondent, Paul G. Mast, a Municipal Court Judge, began his third term of office on January 6, 1975. Respondent retired during the pendency of said term on January 15, 1979.

Respondent's retirement benefits were deferred until his sixty-third birthday on May 28, 1995. The claim which precipitated this proceeding was filed in June 1994, prior to Respondent receiving any retirement benefits.

Pursuant to the ruling in *Olson v. Cory* (1980), 27 Cal. 3d 532, 164 Cal.Rptr. 217, Respondent's pension rights vested in accordance with the law as it existed at the time he

1 look 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.
27
28

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

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 The Supreme Court, in *Olson v. Cory*, supra, ruled that said amendment was
23 unconstitutional on the grounds that it impaired vested contractual rights in violation of the
24 United States Constitution, stating that salaries of elected state officers may not be reduced
25 during their term of office. The Supreme Court stated that the ruling applied to any judge who
26 served any portion of his term prior to January 1, 1977, and as to judicial pensioners
27
28

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 1978 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 1978 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
5 advantages. Since no new comparable or offsetting benefit appeared in the
6 modified plan,, we held the 1976 statute unconstitutionaly impaired the
7 pensioner's vested rights. . . .

8 . . . The salary for such a judicial office - if the retired or deceased judge
9 served in office during the period 1970 to 1977 - was covenanted to increase
10 annually with the increase in CPI. The 1978 limitation on increases in judicial
11 salaries is, in turn, calculated to diminish benefits otherwise available to those
12 judicial pensioners. Such modification of pension benefits works to the
13 disadvantage of judicial pensioners by reducing potential pension increases,
14 and provides no comparable new benefit. Again we conclude that defendants
15 have failed to demonstrate justification for impairing these rights or that
16 comparable new advantages were included and that section 68023 as
17 amended is unconstitutional as to certain judicial pensioners.

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

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

27 In this case, Respondent was a judge holding such a particular judicial office, a
28 "protected term", in that his term began January 6, 1975, which was within the window period
of 1970 to 1977. His pension rights were forever vested by the fact that he retired during the
"protected term" on January 15, 1979, prior to the expiration of his "protected term". Said
"protected term" would have expired January 1, 1981, had Respondent not previously retired.
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:

1 Judicial pensioners whose benefits are based on judicial services
2 terminating while section 68203 provided for unlimited cost-of-living increases
3 in judicial salaries (Respondent was in this class where the Court held in the
4 *Olson v. Cory* case that section 68203 provided for unlimited cost-of-living
5 increases until the end of Respondent's term that began January 6, 1975),
6 acquired a *vested* right to a pension benefit based on some proportionate
7 share of the salary of the judge or justice occupying the particular judicial office
8 including the incumbent judge's or justice's unlimited cost-of-living increases.

9 The Supreme Court states that if a judge embarks on a new term after December 31,
10 1976 (which Respondent did not do), then his future salary and his pension rights are
11 governed by the 1976 Amendment to Section 68203 on page 542:

12 Finally, as in the case of judges or justices who enter upon a new or
13 unexpired term of a predecessor judge after 31 December 1976, benefits of
14 judicial pensioners based on the salaries of such judges will be governed by
15 the 1976 amendment.

16 The conclusion of the Supreme Court is on page 546:

17 We conclude that Government Code Section 68203 as amended in
18 1976, insofar as it would limit cost-of-living salary increases as provided by
19 section 68203 before the 1976 amendment, cannot be constitutionally applied
20 to (1) a judge or justice during any term of office, . . . if the judge or justice
21 served some portion thereof (a "protected term") prior to 1 January 1977, and
22 (2) a judicial pensioner whose benefits are based on some proportionate
23 amount of the salary of the judge or justice occupying that office.

24 **No comparable new benefit**

25 The Petitioner in its Statement of Issues, infers that there may have been some
26 "comparable new benefit" received by Respondent which would offset his vested pension
27 rights. The Supreme Court in *Olson v. Cory* specifically holds that there was no "comparable
28 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.

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

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

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 or deceased judge was last elected or appointed (See e.g., Gov. Code, §§ 75032, 75033.5 [emphasis supplied] 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.

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

Next, Petitioner states at page 5, line 14, "The long-standing interpretation of a statute by the agency entrusted with its implementation will be given weight by the courts." In support of this proposition Petitioner cites *Neely v. Board of Retirement*, (1974) 38 C.A.3d 815, 111 Cal.Rptr. 841, and *City of Sacramento v. Public Employees Retirement System*, (1991) 229 Cal.App.3d 1470, 280 Cal. Rptr. 847. The cases do not stand for what Petitioner cites them for, but even if they did, the interpretation of the Petitioner Chief Executive Officer cannot

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

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

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

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

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

In the instant case, the material facts are not in dispute. The question involves only the interpretation and application of the law. A question of law is thus presented upon not only 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, 1996

Paul G. Mast
Respondent



**SETTLEMENT AGREEMENT AND
DOCUMENTS
EXHIBIT O**



Legal Office
P.O. Box 942707
Sacramento, CA 94229-2707
Telecommunications Device for the Deaf - (916) 326-3240
(916) 558-4097
Telecopier: (916) 326-3659

September 20, 1996

VIA FAX

Paul G. Mast
[REDACTED]

Re: Appeal in the Matter of Application for Retirement

Dear Judge Mast:

This is to confirm in writing, that the Judges' Retirement System (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. If you have any questions regarding the settlement procedure, please call me at the number shown above.

Sincerely,

MAUREEN REILLY
Senior Staff Counsel

MLR:sol

cc: Michael Priebe

Judge Paul G. Mast (Ret.)
[REDACTED]
[REDACTED]

August 5, 1996

Maureen Reilly
Senior Staff Counsel
Legal Office
California Pers
Box 942707
Sacramento, CA 94229-2707

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. Reilly:

Pursuant to our recent telephone conversation, I am writing at this time in order to attempt to resolve this matter. I have received the Statement of Issues and the Notice of Hearing. I recognize the fact that it is possible for a party to lose in any litigation regardless of how strong that party's position is. Even though it is clear to me that my position is correct, I can recognize the possibility that an Administrative Law Judge could rule adversely to me and that the matter would have to be taken to the court system. This is not what I want. I recognize that it would be burdensome to me as well as very devastating to CalPers. It is clear that it is in the interest of both sides to resolve the matter now. In that spirit I am writing this letter.

In reading your statement of issues, you make two points:

First, *Government Code Section 75033.5* does not change the arguments at all. That section must be interpreted with section *68203*, as you state, but it must be interpreted as it existed at the time I took office, not after *Section 68203* was later changed. The contractually vested rights were as they existed at the time of entering into the contract, i.e. when I took office. This was confirmed in *Olson v. Cory*.

Second, the *Neeley* and *City of Sacramento* cases gives power to the agency to make interpretations when there are ambiguities. They do not give power to the agency to interpret contrary to the established rule of law. The rule of law is clearly and cogently set forth in *Olson v. Cory*, wherein it states:

A judge entering office is deemed to do so in consideration of -- at least in part -- 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 [citations omitted], the

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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.** [bold type added]

As you know, the term of office from which I retired began on January 1, 1976, which was during the period specified in the above case.

In accordance with *Olson v. Cory*, as stated above, *Section 68203* provided for unlimited cost of living increases throughout my then-existing term. This was confirmed by the State Controller's office which paid me the balance of the salary due me in accordance with *Olson v. Cory*.

Olson v. Cory further states:

Judicial pensioners whose benefits are based on **judicial services terminating while section 68203 provided for unlimited cost of living increases in judicial salaries**, 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.** [bold type added]

After reading the Statement of Issues and the appropriate sections of *Olson v. Cory*, it seems to me that it is very certain that I will prevail on the claim.

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.

I first assumed judicial office when I was 33 years old, and retired when I was 46, in 1979. It is most unlikely that there is anyone who took deferred retirement when the law was as it was when I retired, that has not already begun receiving their retirement benefits. In other words, I am the last, and resolving this claim in a confidential manner can be expected to completely end the issue for CalPers.

If the claim goes to hearing and decision with the Office of Administrative Hearings (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 intention 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.

Very truly yours,

Paul G. Mast

SETTLEMENT AGREEMENT

between

JUDGES RETIREMENT SYSTEM and PAUL G. MAST

The parties to this agreement, the Judges Retirement System (JRS) and Paul G. Mast (Mast), 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 Mast'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 Mast became eligible to receive a retirement allowance, May 28, 1995.
4. Mast 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 the signatures below, JRS and Mast agree to enter this settlement agreement as a legally binding contract on the date signed by the last party to sign.

Date: 10/22/96

M. L. S. P.
MICHAEL PRIEBE, Manager
Judges' Retirement System

Date: 10-8-96

Paul G. Mast
PAUL G. MAST
SSN: [REDACTED]

JRS-A 000701

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PAGE 1-JRS LETTER TO PAUL MAST – JULY 7, 1997
PAGE 2-JRS SCHEDULE OF BENEFIT PAYMENTS
MAY 1995 TO AUGUST 2010
EXHIBIT P



Judges' Retirement Systems
P.O. Box 942705
Sacramento, CA 94229-2705
Telecommunications Device for the Deaf - (916) 326-3240
(916) 326-3688; FAX - (916) 658-1500

July 7, 1997

Judge Paul Mast (Ret.)



Dear Judge Mast:

This letter is in regards to an adjustment to your monthly retirement allowance.

As you know, you are the only retired judge who is getting an annual cost-of-living adjustment. This is the first year for us to adjust your retirement pension. I want to apologize for not having this completed earlier.

There is an adjustment of approximately 3% to your retirement allowance effective January 1, 1997. Your previous allowance was \$5,720.08. Your new monthly allowance will be \$5,893.83, a \$173.75 increase. Your July 31, 1997 retirement check will be adjusted to include the amount owed to you from January 1, 1997 through June 30, 1997. The gross amount of your July retirement warrant will amount to \$6,936.33. Your future warrants through December 31, 1997 will amount to \$5,893.83.

I want to wish you and your family the very best. If you have any questions please give me a call at the above telephone number.

Sincerely,

A handwritten signature in cursive script, which appears to read "Jim Niehaus", is written over a typed name.

Jim Niehaus
Retirement Program Specialist II
Judges' Retirement System

cc: Rae Gamble
Retirement Program Specialist I

California Public Employees' Retirement System
Lincoln Plaza - 400 P Street - Sacramento, CA 95814

N Vinuquerra
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May-95	521.53
Jun-95	4,041.89
Jul-95	4,041.89
Aug-95	4,041.89
Sep-95	4,041.89
Oct-95	4,041.89
Nov-95	4,041.89
Dec-95	4,041.89
Jan-96	4,041.89
Feb-96	4,041.89
Mar-96	4,041.89
Apr-96	4,041.89
May-96	4,041.89
Jun-96	4,041.89
Jul-96	4,041.89
Aug-96	4,041.89
Sep-96	4,041.89
Oct-96	4,041.89
Nov-96	4,041.89
Dec-96	30,991.51
Jan-97	5,720.08
Feb-97	5,720.08
Mar-97	5,720.08
Apr-97	5,720.08
May-97	5,720.08
Jun-97	5,720.08
Jul-97	6,936.33
Aug-97	5,893.83
Sep-97	5,893.83
Oct-97	5,893.83
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Dec-97	5,893.83
Jan-98	5,893.83
Feb-98	5,893.83
Mar-98	5,893.83
Apr-98	6,436.07
May-98	6,029.39
Jun-98	6,029.39
Jul-98	6,029.39
Aug-98	6,029.39
Sep-98	6,029.39
Oct-98	6,029.39
Nov-98	6,029.39
Dec-98	6,029.39
Jan-99	6,029.39
Feb-99	6,029.39
Mar-99	6,029.39
Apr-99	6,029.39
May-99	6,029.39
Jun-99	6,029.39
Jul-99	6,029.39
Aug-99	6,801.25

Sep-99	6,125.96
Oct-99	6,125.96
Nov-99	6,125.96
Dec-99	6,125.96
Jan-00	6,125.96
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Mar-00	6,532.10
Apr-00	6,261.34
May-00	6,261.34
Jun-00	6,261.34
Jul-00	6,261.34
Aug-00	6,261.34
Sep-00	6,261.34
Oct-00	6,261.34
Nov-00	6,261.34
Dec-00	6,281.34
Jan-01	6,261.34
Feb-01	6,261.34
Mar-01	6,892.48
Apr-01	6,471.72
May-01	6,471.72
Jun-01	6,471.72
Jul-01	6,471.72
Aug-01	6,471.72
Sep-01	6,471.72
Oct-01	6,471.72
Nov-01	6,471.72
Dec-01	6,471.72
Jan-02	6,471.72
Feb-02	6,471.72
Mar-02	6,471.72
Apr-02	6,471.72
May-02	6,471.72
Jun-02	6,471.72
Jul-02	6,471.72
Aug-02	6,471.72
Sep-02	6,471.72
Oct-02	6,471.72
Nov-02	6,471.72
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Jan-03	6,652.93
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Mar-03	6,652.93
Apr-03	6,652.93
May-03	6,652.93
Jun-03	6,652.93
Jul-03	6,652.93
Aug-03	6,652.93
Sep-03	6,652.93
Oct-03	6,652.93
Nov-03	6,652.93
Dec-03	10,080.40

Jan-04	6,652.93
Feb-04	6,652.93
Mar-04	6,652.93
Apr-04	6,652.93
May-04	6,652.93
Jun-04	6,652.93
Jul-04	6,652.93
Aug-04	6,652.93
Sep-04	6,652.93
Oct-04	6,652.93
Nov-04	6,652.93
Dec-04	6,652.93
Jan-05	6,652.93
Feb-05	6,652.93
Mar-05	6,652.93
Apr-05	7,360.81
May-05	6,829.90
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Jul-05	6,829.90
Aug-05	6,829.90
Sep-05	6,829.90
Oct-05	6,829.90
Nov-05	6,829.90
Dec-05	6,829.90
Jan-06	6,829.90
Feb-06	6,829.90
Mar-06	6,829.90
Apr-06	6,829.90
May-06	6,829.90
Jun-06	6,928.93
Jul-06	6,928.93
Aug-06	6,928.93
Sep-06	6,928.93
Oct-06	6,928.93
Nov-06	6,928.93
Dec-06	6,928.93
Jan-07	6,928.93
Feb-07	6,928.93
Mar-07	6,928.93
Apr-07	6,928.93
May-07	6,928.93
Jun-07	6,928.93
Jul-07	6,928.93
Aug-07	6,928.93
Sep-07	6,928.93
Oct-07	6,928.93
Nov-07	6,928.93
Dec-07	6,928.93
Jan-08	6,928.93
Feb-08	6,928.93
Mar-08	6,928.93
Apr-08	6,928.93

May-08	6,928.93
Jun-08	6,928.93
Jul-08	6,928.93
Aug-08	6,928.93
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Dec-08	6,928.93
Jan-09	6,928.93
Feb-09	6,928.93
Mar-09	6,928.93
Apr-09	6,928.93
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Dec-09	6,928.93
Jan-10	6,928.93
Feb-10	6,928.93
Mar-10	6,928.93
Apr-10	6,928.93

Sum= 1,158,354.20



LETTER MAST TO NIEHAUS (JRS) MAY 1, 1995
EXHIBIT W

Paul G. Mast

Attorney at Law

Fax: (714) 448-8817

Judge Paul G. Mast (Ret.)

May 1, 1995

Judges Retirement System
400 P Street
P.O. Box 942705
Sacramento, CA 94229-2705

Fax: 916-326-3270

Attention: Jim Niehaus
Lead Analyst

Dear Mr. Niehaus:

Thank you for your recent telephone call. As communicated to you previously, I elect to have the salary at the time of my retirement adjusted by unlimited cost-of-living increases. I understand that your office is handling hundreds of pensions, all of which are being paid based upon the current salary of a sitting judge. The purpose of this letter is to address your concerns by explaining that I am entitled to the benefits which I am electing to receive and demonstrating that I am the only pensioner so entitled.

Before reviewing the California Supreme Court holding presented in *Olson v. Cory*, 27 Cal. 3d 532 (1980), consider the following brief history of the legislative changes in the law regarding judicial compensation:

Prior to January 1, 1970 (1969 change in the law):
No provision for any cost-of-living increases in the compensation of judges or any other automatic increases.

Effective January 1, 1970:
Legislature instituted cost-of-living increases without any limitation or cap as to the amount of annual increase.

Effective January 1, 1977 (the 1976 change in the law):
Legislature imposed a 5 percent limitation or cap on the amount of annual increase.

In 1980:
Legislature linked the annual increase in judicial compensation to the compensation increases of

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JRS-A 000553

salaries of State Employees, might be greater than the CPI increase provided for under the pre-1976 law.

Other pertinent portions of *Olson v. Cory* follow.

[W]e deal here with the right to compensation by persons serving their term of public office to which they have undisputed rights. '[Public] employment gives rise to certain obligations which are protected by the contract clause of the Constitution....' . . .

Promised compensation is one such protected right. . . .

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

A judge entering office is deemed to do so in consideration of -- at least in part -- 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 (see Cal. Const., art. VI, @ 16; Gov. Code, @@ 71145, 71180), 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.' . . .

[I]t is clear a pensioner's contractual benefits are merely derivative from covenants of employment. Moreover, as will be seen in our discussion of Proposition 6, that constitutional provision forecloses any salary reduction during a judge's term in office, including reduction in a cost-of-living provision enacted during the same term in office.

The word 'salaries' in the last sentence of Proposition 6 is thus intended to mean cost-of-living salaries because the appropriating law then provided for annual cost-of-living adjustments. It follows that the provision in Proposition 6 that "[salaries] of elected state officers may not be reduced during their term of office" forecloses during that term any limitation on cost-of-living increases even though such increases were first provided by the Legislature during that same term. To the extent that the 1976 amendment to Government Code section 68203 contemplates such limitations it is unconstitutional.

Judicial pensioners whose benefits are based on judicial services terminating while section 68203 provided for unlimited cost-of-living increases in judicial salaries, 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.

You have asked whether I received any compensation after *Olson v. Cory*. Apparently there was some question in your office whether there was a payment made to judges in consideration of their waiving their rights under the old law. During the pendency of *Olson v. Cory*, the State Controller partially withheld salary from judges whose terms began prior to the 1976 change in the law. After *Olson v. Cory* was decided, the State Controller paid the salary which previously had been withheld. In my case, this payment was only for the differential in the salary from July 1, 1978 (the date the salary differential first began) until January 15, 1979 (the date I retired). The amount was very small, I believe about \$200. There was no payment as consideration for giving up any rights which had been vested under the former law, as in fact there could not have been, as no such consideration or settlement was provided for by law or by court decision.

As you confirmed I am the only retired judge with a deferred retirement whose rights are still vested under the old law. The question is whether there are vested rights held by a large number of pensioners already receiving compensation who would be entitled to a recalculation, resulting in increased current and future pension benefits and an award of underpaid prior benefits. Obviously such a situation would cause administrative and fiscal burdens.

Any judge who has already begun receiving retirement benefits without requesting that his or her benefits be calculated under the old law to which he or she has vested rights, has elected to receive benefits under the new law. The Supreme Court recognized that a "protected" judge, upon beginning to receive benefits may make an election as to whether to receive benefits under the pre 1976 compensation plan, or under the plan existing at the time he received benefits. This election is referred to in Note 8 to *Olson v. Cory* quoted below.

n9 The Legislature has clearly indicated its intent, in recognition of vested interests, to provide minimum levels or to afford elections by which differing levels of compensation may become available to judicial pensioners.

Upon receiving retirement benefits calculated under the law as it existed at the time of retirement, without requesting that retirement benefits be paid under the pre-1976 law; a judicial pensioner may be held to have made a *de facto* election to receive benefits under the then existing law.

When viewed prospectively, from the 1970's, and particularly after the change in the law in 1980, a judge would not know with a certainty whether his or her retirement benefits would be greater under the pre-1976 law or under the then prevailing law. This is because the legislature might increase the salaries of incumbent judges at any time (as it had several times before) or the automatic increase system as tied to the

State employees. This change is not relevant to our discussion.

Olson v. Cory holds that the rights of judges and judicial pensioners, whose terms began prior to the passage of the 1976 law are vested contractual rights and may not be abrogated. This holding is based upon the United States Constitution, Art. 1, § 10, the California Constitution Art. 1, §9 and Art. III, §4, and an initiative measure added to the California Constitution in 1972, which is referred to in *Olson v. Cory* as Proposition 6. As such, the compensation of judges may not be diminished during their term of office, nor may the compensation paid to judicial pensioners, or their rights thereto, be diminished, if they retired prior to beginning a new term of office.

The *Olson v. Cory* decision holds that the 1976 amendment impaired the vested rights of judicial pensioners as well as those of judges in office. As your records show the last term of judicial office which I held began January 1, 1975. During the middle of my term of office I retired January 15, 1979. Having retired during my term that began in 1975, I not only fall within the class of judges in office with vested rights, but as of the date of my retirement, January 15, 1979, I became a judicial pensioner.

The *Olson v. Cory* decision clearly holds that for all judges that retired during a term that began prior to the 1976 change in the law, the contractual rights for judicial pensioners are vested in accordance with the law as it was at the time the judges term began. As a Judge who was elected to and began a term of office prior to the 1976 change in the law, and retired prior to the expiration of that term, my pension rights were completely vested in accordance with the law as it was at the time my term of office began on January 1, 1975. Pertinent portions of *Olson v. Cory* follow. Please note that the emphasis and highlighting of sections are mine and are not in the original.

In the present case the state has purported to modify pension rights with the amendment of section 68203. Between 31 December 1969 and 1 January 1977, a judicial pensioner was entitled to receive benefits based on a specified percentage of the salary of a judge holding the judicial office to which the retired or deceased judge was last elected or appointed. (Gov. Code, @ 75000 et seq.) The salary for such a judicial office – if the retired or deceased judge served in office during the period 1970 to 1977 – was conventioned to increase annually with the increase in the CPI. The 1976 limitation on increases in judicial salaries is, in turn, calculated to diminish benefits otherwise available to those judicial pensioners. Such modification of pension benefits works to the disadvantage of judicial pensioners by reducing potential pension increases, and provides no comparable new benefit. Again, we conclude that defendants have failed to demonstrate justification for impairing these rights or that comparable new advantages were included and that section 68203 as amended is unconstitutional as to certain judicial pensioners.

Based upon the law established by the California Supreme Court in *Olson v. Cory* am in a unique set of circumstances. I elect calculation of my pension benefits under the old law to which I have vested rights.

Very truly yours,


Paul G. Mest



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PROOF OF SERVICE

In the matter of the Amount of Proper Benefits Payable to PAUL G. MAST, Judge, Ret.
AGENCY CASE NO. 2010-0825 OAH NO. 2015-030996

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is [REDACTED];

On Nov 20, 2015 I served the following document(s) by the method indicated below:

RESPONDENT'S TRIAL BRIEF, RESPONDENT'S EXHIBITS TO TRIAL BRIEF, DECLARATION OF PAUL G. MAST, DECLARATION OF MARCI MAST, MOTION IN LIMINE, POINTS AND AUTHORITIES IN SUPPORT OF MOTION IN LIMINE, POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE

by placing the document(s) listed above in a sealed envelope(s) with postage fully prepaid and deposited it with the United States Postal Service at Irvine, California addressed as set forth below.

Jeff Rieger
Harvey L. Leiderman, Esq.
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 20, 2015 at Irvine,, CA.

Marci G. Mast