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9 BOARD OF ADMINISTRATION
10 PUBLIC EMPLOYEES' RETIREMENT SYSTEM

11 In the Matter of the Application)
12 for Retirement from JRS of)

CASE NO. [REDACTED]

13 PAUL G. MAST,

CAH NO. L-9605311

14 Respondent,

STATEMENT OF ISSUES

15 and

16 JUDICIAL COUNCIL OF CALIFORNIA,

17 Respondent.

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

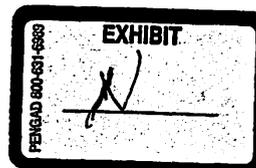
I

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

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.



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
24 years and two months in service credit, which is not in dispute.

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

32 ⁴ The monthly retirement allowance is also adjusted with an
33 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
10 V

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

16 VI

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

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.

5 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.)

22 The deferred retirement procedure was enacted on January 1,
23 1974. (Stats. 1973, ch. 1102.) In other words, it was existing
24 law when the Legislature was debating the amendment to section
25 68203 during the 1976 session.

26 VIII

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

⁸ Under the Administrative Procedure Act, the Board may 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 Betta 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 / / /

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28 ¹¹ See Olson, supra, at fn. 3.

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 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 8, 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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Respondent never received any money or other compensation designed as "a comparable new advantage" to offset the impairment to his pension rights, nor did he ever waive any pension rights.

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

In addition, this issue was addressed by the Supreme Court in *Olson v. Cory* which 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].

POINTS AND AUTHORITIES

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

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

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

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

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decisions has reiterated the principle that a public employee's pension rights are an integral element of compensation and a vested contractual right accruing upon acceptance of employment . . . any changes in a pension plan which result 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. . . .

... The salary for such a judicial office - if the retired or deceased judge served in office during the period 1970 to 1977 - was covenanted to increase annually with the increase in 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 68023 as amended is unconstitutional as to certain judicial pensioners.

Contractually, each judicial pensioner is entitled to some fixed percentage of the salary payable to the judge holding the particular judicial office to which the retired or deceased judge was last elected or appointed. [citations omitted] 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.

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

In this case, Respondent was a judge holding such a particular judicial office, a "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:

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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 *Olson v. Cory* case that section 68203 provided for unlimited cost-of-living increases until the end of Respondent's term that began January 6, 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 *Olson 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.

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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) 36 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

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

Respectfully submitted,

August 16, 1996

Paul G. Mast
Respondant