

*Paul G. Mast, Judge (Ret.)*

[REDACTED]

May 31, 2011

California Public Employees Retirement System  
Judges' Retirement System  
400 Q Street  
Sacramento, CA 95811

**FEDEX Tracking Number 8741 6952 0932**

And submitted electronically to Pamela Montgomery  
[Pamela\\_Montgomery@CalPERS.CA.GOV](mailto:Pamela_Montgomery@CalPERS.CA.GOV)

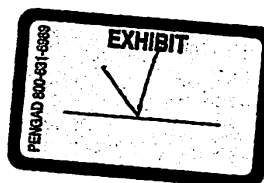
Re: Appeal from Determination in Letter Dated May 4, 2011  
By Pamela Montgomery, Manager, Judges' Retirement System  
Denial of My Request for Additional Increases to Monthly Allowance  
And My Request for a Lump Sum Payment of Unpaid Retirement  
Allowance and Interest

Ladies and Gentlemen:

I Paul G. Mast ("Mast") hereby give Notice of Appeal from the denial in the May 4, 2011 letter to me by Pamela Montgomery, Manager, ("Ms. Montgomery") Judges' Retirement System ("JRS") of my request for additional increases to monthly allowance and my request for a lump sum payment of unpaid retirement allowance and interest contained in my previous letter dated September 1, 2010.

Mast's retirement computation was previously the subject of a proceeding before the Board of Administration, Public Employees' Retirement System:

Case No. [REDACTED]  
OAH No. L-9605311  
In the Matter of the Application for Retirement from JRS  
PAUL G. MAST, Respondent, and  
JUDICIAL COUNCIL OF CALIFORNIA, Respondent ("Proceeding")



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Mast hereby incorporates herein by reference the following:

1. The entire file Proceeding file, including:
  - A. Respondent Mast's Response to Statement of Issues and Points and Authorities dated August 16, 1996 ("Response") and
  - B. Settlement Agreement between Judges' Retirement System and Paul G. Mast dated October 22, 1996 ("Settlement Agreement").
2. All letters from Mast to JRS, including those dated December 2, 2002; August 1, 2003; September 16, 2003; November 10, 2003; March 11, 2004; June 7, 2004; November 8, 2006; and September 1, 2010.
3. The entire file of JRS ("JRS file"). JRS is in possession of the JRS file, including charts, indexes, worksheets, calculations, identification of personnel working on file, and whatever else is contained therein. Mast has requested a copy of the JRS file, but it has not been received to this date.

The Judges' Retirement System ("JRS") and Paul G. Mast ("Mast") **fully settled** [emphasis added] their dispute over his request to recalculate his retirement allowance in the Settlement Agreement dated October 22, 1996.

In the determination letter dated May 4, 2011 ("Determination"), Ms. Montgomery fails to mention the Proceeding and Settlement.

Prior to entering into the Settlement Agreement, JRS calculated the amount of retirement allowance to which Mast was entitled pursuant to *Olson v. Cory*, (1980), 27 Cal. 3d. 532.

The following were agreed upon between Mast and JRS before the parties entered into the Settlement:

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1. The amount of the retirement allowance then payable to Mast ("recalculated retirement allowance");
2. The amount of the accrued arrearages due to Mast ("accrued arrearages");
3. The fact that the retirement allowance then payable to Mast would be annually adjusted in accordance with the requisite Cost of Living Adjustment ("COLA") as stated in the Statute.

The parties entered into the Settlement Agreement and the dispute was fully settled.

Mast received monthly payment of recalculated retirement allowance; Mast received accrued arrearages; and JRS applied the annual COLA to the recalculated retirement allowance each January.

During the settlement negotiations it was Mast's understanding that the annual COLA adjustment was based upon the September CPI and applied the following January. Mast's understanding was based upon JRS statements made during discussions with JRS.

In any year in which the annual calculation for the COLA was not completed in time for the January payment, arrearages accrued. When the annual calculation was completed, any accrued arrearages for months beginning in January were paid. Mast's recalculated retirement allowance was adjusted annually until approximately the year 2000.

JRS calculated the annual COLA according to the Settlement Agreement. Mast has never seen any actual worksheet. Mast has not been able to obtain a chart of the **three** salary classes paid at that time. Mast was not informed of the numbers, indexes, or calculations used. Mast was only informed of the amounts calculated for the recalculated retirement allowance and the accrued arrearages.

On May 28, 1995 Mast was paid on the same basis as all other judges. JRS computed the recalculated retirement allowance and determined the accrued arrearages **before** the Settlement was signed. **During the settlement negotiations** the discussion included the amount of monthly retirement

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allowance and the amount of arrearages. **Mast specifically remembers this because he was asked to waive the arrearages in a specific amount.**

Since the time that JRS stopped performing the annual calculations based upon the annual COLA, Mast has written many letters to JRS.

There have been personnel changes at JRS including changes in the Manager. In 1996 Michael Priebe signed the Settlement Agreement as Manager. After Mr. Priebe, Steve Benitez served as JRS Manager. After Mr. Benitez, Ms. Montgomery began serving as JRS Manager. Mast was told that the personnel changes caused administrative difficulties in calculation and application of the annual COLA because the Mast calculation was unique for JRS.

There never was an issue regarding overpayment. The issues were getting the annual COLA calculated (JRS was late) and knowing how to do the calculation (JRS needed someone more informed to work on the unique case).

The parties knew the meaning and intent of the Settlement Agreement. The written agreement, prepared by JRS, memorialized the agreement between the parties. No figures, calculations, percentages, or other numbers were used. No CPI Index was mentioned by name.

However, JRS calculated according to the Settlement Agreement. Mast has never seen an actual worksheet. Mast has not been able to obtain a chart of the three salary classes paid at the time of retirement. Mast was not informed of any numbers, charts, or worksheets used in calculating the recalculated retirement allowance. Mast was only informed of the calculated amount.

The parties relied on the 1996 Settlement Agreement as fully settling their dispute. Mast relied on the Settlement Agreement. JRS relied on the Settlement Agreement. JRS continued to rely on it in subsequent years.

As stated above, JRS is in possession of the JRS file, including charts, indexes, worksheets, calculations, identification of personnel working on file, and whatever else is contained therein. Mast has requested a copy of the entire JRS file, but has not yet received it.

JRS had sole responsibility for calculation of the recalculated retirement allowance. Mast discusses this in the letter dated September 1, 2010 to JRS.

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Mast was not contacted or consulted. Mast did not offer input. The JRS worksheets were not provided to Mast.

When JRS computed the recalculated retirement allowance and accrued arrearages, JRS presented its conclusions to Mast **prior** to the Settlement Agreement. The JRS calculations were used as the **basis** for the Settlement Agreement. The amounts were acceptable to both JRS and Mast.

Counsel represented JRS at the time of the Settlement Agreement. The Settlement Agreement document was drafted either by JRS staff or by its counsel. Mast did not participate in the drafting.

In the JRS letter dated May 4, 2011 Ms. Montgomery states, in part:

The Settlement Agreement you signed on October 8, 1996, provided for the Judges' Retirement System (JRS) **to calculate** [emphasis added] your allowance based on the definition in former Government Code (GC) section 68203 and based on the compensation you were entitled to on the date of your retirement, pursuant to Olson v. Cory (1980), 27 Cal. 3d. 532.

The language of the paragraph purports to present the gist of the Settlement Agreement. The Settlement Agreement best speaks for itself and can be read in its entirety. Any change in wording is a change in meaning. The above portion of the May 4, 2011 letter is a rewriting of paragraph 2 of the Settlement. The first critical difference is that the actual Settlement Agreement says that JRS **will re-calculate**; it does **not say to calculate**.

The second critical difference is that the actual Settlement Agreement uses paragraph 2 as a definition for paragraph 3:

**Said recalculated retirement allowance** shall begin on the date that Mast became eligible to receive a retirement allowance, May 28, 1995.

In Ms. Montgomery's letter dated May 4, 2011 paragraph 3 is entirely omitted.

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**What is the meaning of the Settlement Agreement?**

The Settlement Agreement needs to be read in whole. There were settlement negotiations prior to the creation of the Settlement Agreement. Then there were actions of JRS based on the Settlement Agreement. These actions included payment of the **recalculated retirement allowance, accrued arrearages, and annual COLA** for years subsequent to the Settlement Agreement. Mast received the payments that he expected to receive pursuant to the Settlement Agreement.

When personnel changes at JRS made it difficult for JRS to timely calculate the annual COLA, there was the beginning of what eventually was more than the previous annual delay measured in months and reflected in the arrearages paid when the annual COLA calculation was completed. While JRS was under the management of Mr. Benitez communications were exchanged but no calculations were completed because of clerical difficulties.

Subsequently JRS management changed. Ms. Montgomery and Mast exchanged various communications prior to the May 4, 2011 letter. By some time in 2009 Ms. Montgomery said that she had some questions about the legal agreement and was waiting for word from her attorneys. Ms. Montgomery was speaking about the 1996 Settlement Agreement and wondering about legal issues. Her guess was that legal had not looked at the case yet. By August 9, 2010 Ms. Montgomery was writing a letter to Mast, followed by the letter dated May 4, 2011.

**The Settlement Agreement is an Accord and Satisfaction**

The California Civil Code defines accord and satisfaction.

Section 1521 provides:

An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled.

Section 1523 provides:

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

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JRS, prior to May 28, 1995, calculated what they said would be Mast's retirement allowance. In Mast's Response, Mast formally presented legal authority from three *Olson v. Cory* cases. Initially Mast, familiar with *Olson v. Cory*, *supra*, advised JRS that they were in error in their calculations. JRS responded that they were not wrong, and later stated that they were not aware of *Olson v. Cory* and had never applied any holdings in that case to any retirement allowance.

A dispute thereby existed, and the matter was set before the Board of Administrative Hearings (Proceeding, *supra*). Points and Authorities were filed by JRS. Points and Authorities were then filed by Mast. After the attorneys for JRS examined Mast's Points and Authorities, they and their client JRS concluded that Mast was correct in his claim. Discussions resulted in the Settlement Agreement.

During those negotiations, the recalculation of the retirement benefits was accomplished leading up to both the initial monthly allowance (recalculated retirement allowance) and calculation of the arrearages that had accrued after May 1995 (accrued arrearages).

Demand was made by JRS during the negotiations that Mast waive the accrued arrearages. Mast declined to waive the accrued arrearages, and the accrued arrearages were paid at or about the time of the signing of the Settlement Agreement. JRS and/or its attorneys drafted the entire Settlement Agreement.

Thereafter, the retirement benefits were adjusted each January, based upon the previous September CPI. These were the dates JRS stated were proper and Mast did not question that. Mast felt at this time that JRS was forthright; he did not question any calculations. The calculations were made honestly by JRS, and both parties relied upon them.

Mast now finds that in fact the COLA calculations should have been made, and the adjustments applied in July of each year (see Government Code Section 68203, *infra*). Mast is not asking for recalculation of retirement benefits based upon the proper COLA adjustments for the time prior to the failure of JRS to abide by the Settlement Agreement in about the year 2000, even though a recalculation would result in additional benefits owed to Mast. Mast recognizes

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that the sanctity of the Settlement Agreement precludes this just as it precludes JRS from recalculating the benefits on the basis of alleged errors in calculations.

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.

#### **Rescission Requires Reasonable Diligence**

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*, 134 Cal. 226, 242, 193 P. 243; *Neff v. Engler*, 205 Cal. 484, 488, 271 P. 714, 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 demurrable. *Bancroft v. Woodward*, 133 Cal. 99, 109, 160 P. 445. A delay of more than one month in serving notice of rescission



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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 Mast 1996 Settlement Agreement was created **fifteen years ago**.

Ms. Montgomery would argue that she does not want to rescind the agreement; she wants recalculate the amount due under the Settlement Agreement. She would be wrong. The calculation done by JRS in 1996 was both

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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.

Further, as shown in *Fabian*, it is not material and should not be considered whether Mast was prejudiced by the fifteen-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 this 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*.

In conclusion, Mast Retirement Benefits were annually adjusted (although not always in a timely manner) in accordance with the Settlement Agreement until approximately 2000.

Thereafter the personnel at JRS changed. The new personnel did not understand what was necessary for them to do, would not follow directions from Mast, and would not seek assistance elsewhere to determine what they should do. (Mast believes that the Manager Steve Benitez was in good faith, but did not understand what had to be done).

In approximately 2005, the personnel at JRS changed, as did their attitude. Thereafter, they no longer tried to determine what they were obligated to do under the Settlement. Over a period of about six years they refused to do anything and came up with one invalid reason after another to avoid paying the amount due. The May 4, 2011 Determination is a continuation of that avoidance.

Any attempt at this late date to recalculate the amount due or revisit the Settlement Agreement is prohibited by the principles of laches.

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**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 Mast to believe that the calculations that were the basis for Settlement Agreement were true and correct. 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 occurred in 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.

**Other: Starting Salary**

In view of the above, the amount of starting salary used by JRS in the calculations is not material. However, Mast does not agree that the starting salary referred to in the May 4, 2011 Determination is correct, as Mast has not been provided with any documentation to so indicate. The starting salary was determined by JRS in 1996, as part of the calculation of the retirement benefits leading up to the Settlement Agreement.

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

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**California Government Code Section 68203 Sets Adjustment Dates**

There are questions of application of COLA both when the change to the index is measured and when the increase is applied.

The proper adjustment periods are presented in Government Code section 68203, and are clear on the face of that section.

California Government Code Section 68203 was amended in 1969 to state:

In addition to the increase provided under this section on September 1, 1968, on the effective date of the 1969 amendments to this section and on September 1 of each year thereafter the salary of each justice and judge named in Sections 68200 and 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year.

California Government Code Section 68203 was amended in 1976 to state:

On July 1, 1978, and on July 1 of each year thereafter the salary of each justice and judge named in Sections 68200 and 68202, inclusive, shall be increased by that amount which is produced by multiplying the then current salary of each justice or judge by the percentage by which the figure representing the California consumer price index as compiled and reported by the California Department of Industrial Relations has increased in the previous calendar year, but not to exceed five percent (5%).

The Legislature may change contractual benefits if they give something of equal, similar, or greater value in exchange. (*Olson v. Cory, supra.*) Changing the adjustment and increase dates from September to July would be such a change as something of equal, similar, or greater value is given.

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Neither the current Government Code Section 68203 nor the 1981 amendment is relevant to the issues herein, as no changes in the relevant portions of the Statute has been made.

The May 4, 2011 Determination states at the end of item 2:

The change to the index was measured from December to December and the increase was applied the following September 1<sup>st</sup>.

This is not correct.

Mast does not know why or how JRS used an adjustment period of January based upon the prior September CPI during the periods adjustments were made, ending in about 2000. However, Mast does not challenge or ask to recalculate the adjustments made up to about 2000 for the above-stated reasons.

The date of the COLA calculation that applies in this matter is July 1. The COLA is from July 1 of the preceding year to July 1 of the current year. The increase is effective on July 1<sup>st</sup> of each year.

**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** [emphasis added] after discovery of this right. . .
- (b) . . .board shall correct all actions taken as a result of errors or omissions of . . . this system.

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In the May 4, 2011 letter Ms. Montgomery states, "GC Section 20160 (b) requires that we correct all errors made by the System." She overlooked that GC Section 20160 (a)(1) precludes any such correction under any circumstances at this time.

Ms. Montgomery cites 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 a 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.

**California Government Code Section 20164 Provides Periods of Limitation of Actions**

California Government Code Section 20164 provides in pertinent parts of subdivision (b):

For the purposes of payments into or out of the retirement fund for adjustment of errors or omissions . . . pursuant to Section 20160 . . . 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.
- (2) In cases where this system owes money to a member or beneficiary, the period of limitations shall not apply.

In the Determination Ms. Montgomery states, "Over the years, this error resulted in an overpayment to you totaling approximately \$94,304.19."

For the reasons *supra* Mast states that no error occurred and that if it did, the finality of the Settlement Agreement precludes any changes.

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Ms. Montgomery fails to mention Government Code Section 20164(b)(1) even though in a prior letter dated August 9, 2010, Ms. Montgomery clearly states:

GC section 20164(b)(1) provides that where this System makes an erroneous payment to the member, our right to collect expires three years from the date of payment. Because we are only authorized to collect any overpayment that occurred during the past three years, we will not collect the \$95,449.88 you were overpaid.

### **ACCOUNTING**

Mast submitted a letter dated August 9, 2010 and included an accounting prepared by his accountant showing the amount of arrearages due to that date and the amount the Retirement Benefits should be each month.

The submitted accounting assumed as correct the dates of adjustment stated by JRS, *supra*. These dates involved using the CPI period of December to December with the COLA being applied the subsequent September. Mast now finds that such dates were incorrect. Refer to California Government Code Section 68203 for the correct dates.

Mast will provide an updated accounting, using the calculation and adjustment dates set forth in Government Code Section 68203. If there will be a formal hearing before the Board of Administrative Hearings, the updated accounting will be submitted with the Points and Authorities. If no hearing is applied for, then the updated accounting will be submitted to JRS through the CalPERS Legal Office.

Respectfully submitted,

Paul G. Mast



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California Public Employees' Retirement System  
Judges' Retirement System

September 18, 2015

Paul G. Mast  
[REDACTED]

CID: [REDACTED]

Dear Judge Mast:

**RE: Annual Cost-of-Living Adjustment**

We have applied a .886 percent cost-of-living adjustment to your allowance effective September 1, 2015. Your new gross allowance will be \$8,110.10 (before your Medicare Reimbursement), and will be paid on your September 30, 2015, dated warrant.

This percentage is based on the California Consumer Price Index, Urban Wage Earners and Clerical Workers (CCPI-W), December 2013 to December 2014. Attached is a chart showing the calculation of the increase (shown as a percentage).

While applying this year's COLA, we also found an error of \$2.10 made in the calculation of your 2012 COLA. This error caused you to be overpaid a total of \$77.28, from September 1, 2012 through August 31, 2015. Attached is a month by month calculation of the COLA overpayment. The full amount of the overpayment of \$77.28 will be withheld from your October 31, 2015, dated warrant.

We apologize that this error occurred, but are required by law to correct the error and recover the overpayment. If you have any questions about this overpayment, you may contact our office directly.

Sincerely,

Judges' Retirement System



California Consumer Price Index, Urban Wage Earners and Clerical Workers  
(CCPI-W) December to December

Prior Year	Current Year	Year COLA applied	Effective Date	Current Year Index Value	Prior Year Index Value	Percentage Increase	CCPI-W December to December
Dec-13	Dec-14	2015	9/1/2015	236.733	234.654	0.886%	1982-1984=100
Dec-12	Dec-13	2014	9/1/2014	234.654	230.922	1.616%	1982-1984=100
Dec-11	Dec-12	2013	9/1/2013	230.922	226.17	2.101%	1982-1984=100
Dec-10	Dec-11	2012	9/1/2012	226.170	220.693	2.480%	1982-1984=100
Dec-09	Dec-10	2011	9/1/2011	220.693	217.112	1.650%	1982-1984=100

Data can be found at:

<https://www.dir.ca.gov/oprl/CPI/EntireCCPI.PDF>