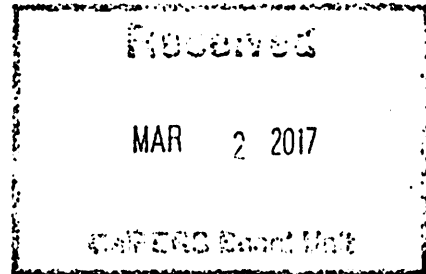


ATTACHMENT C
RESPONDENT(S) ARGUMENT(S)

STANLEY L. FRIEDMAN
ATTORNEY AT LAW

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March 2, 2017



*By Facsimile to (916) 795-3972
and Priority Express Mail*
Ms. Cheree Swedensky
Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229-2701

**Re: Respondent's Argument in the Matter of the Appeal Regarding the Final
Compensation Calculation of GEORGE A. PEREZ, Respondent, and CITY of
CUDAHY, Respondent; Board Case No. 2015-0666; OAH No. 2016050850**

Dear Ms. Cheree Swedensky:

Please accept this letter as Respondent's Argument of George A. Perez in the above-captioned matter.

- A. The Board is Respectfully Requested to Designate the Decision as Precedent, in Whole, if it is Adopted.**

In PERS Precedential Decision No. 15-01 (the Adams Decision), the Board of Administration California Public Employees' Retirement System ("the Board") affirmed CalPERS' calculation of the service retirement allowance to Randy G. Adams. In the Adams decision, it was noted that Mr. Adams was complicit in wrongdoing occurring in the city of Bell. The following was noted:

"On April 15, 2009, Mr. Adams sent Ms. Spaccia an email. He ended the email as follows: 'I am looking forward to seeing you and taking all of Bell's money?! Okay ... just a share of it!!'

On April 16, 2009, Ms. Spaccia sent an email to Mr. Adams that responded to the attachment to CAO Rizzo. The email stated:

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LOL ... well you can take your share of the ple ... just like us!!! We will all get fat together ... Bob has an expression he likes to use on occasion ...

Pigs get Fat ... Hogs get slaughtered!!!! So long as we're not Hogs ... all is well!

Have a nice night ... see you tomorrow

...

By email dated May 27, 2009, Ms. Spaccia stated that the revisions Mr. Adams proposed 'were fine with the following exceptions: ... 2) Do not include the last sentence you added in Section 5.6 We have crafted our Agreements carefully so we do not draw attention to our pay. The word Pay Period is used and not defined in order to protect you from someone taking the time to add up your salary.' [footnote omitted.]

However, in contrast to Mr. Adams, the Proposed Decision in regard to Mr. Perez reveals that there is no finding of wrongdoing by Mr. Perez. Rather, the problems that arose in regard to Mr. Perez receiving the benefits to which he would otherwise be entitled were based on failures by the city of Cudahy. If the Proposed Decision were to become final it would be a very harsh result for Mr. Perez who dedicated most of his working life to the city of Cudahy and is now, after many years of dedicated service, being deprived of appreciable promised retirement income. To the extent that the final decision is contrary to Mr. Perez's interests then it is important that other individuals (like Mr. Perez) and other municipalities (like the city of Cudahy) be forewarned that there will be severe adverse consequences by a failure of the City Clerk (or other government official) to comply with the Public Employees' Retirement Law (PERL), found in Government Code section 20000 *et seq.*

B. Factual Background.

George A. Perez ("Respondent") entered into four separate contracts with the city of Cudahy ("Cudahy") dated, respectively, as follows: August 30, 2000; April 16, 2003; June 28, 2006; and October 7, 2008. Each of the above-described separate contracts were listed and described in Cudahy City Council Agendas. Each of the above-described contracts obligated Cudahy to make certain retirement and healthcare contributions to the California Public Employees' Retirement System ("CalPERS"), which it did. Additionally, Cudahy promulgated memoranda of understanding which further obligated Cudahy to make certain retirement and healthcare contributions to CalPERS.

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On March 28, 2011, at a special meeting, Cudahy terminated Respondent and sent him written notice of such termination on April 12, 2011.

On January 3, 2014, CalPERS notified Respondent that, while Cudahy reported his payrates to CalPERS, according to CalPERS, the reported payrates were not compliant with California Public Employees' Retirement Law ("PERL") and consequently Respondent's retirement benefits and healthcare benefits would be recalculated with payrates that were compliant with the PERL. Accordingly, CalPERS proceeded with recalculating Respondent's retirement benefits using a lower monthly payrate amount.

Respondent filed a timely appeal on January 27, 2014.

C. A Change in the Law Does Not Act Retroactively to the Detriment of Respondent.

In its Closing Brief, CalPERS based its recalculation of Respondent's benefits, in part, on California Code of Regulations Section 570.5. See CalPERS Closing Brief, p. 6. Yet, such reliance was misplaced.

On August 19, 2011, California Code of Regulations Section 570.5¹ became effective. It related to a member's "compensation earnable" for purposes of determining the member's retirement allowance; for purposes of determining "compensation earnable," a member's payrate would be limited to the amount listed on a pay schedule that met all of the following requirements:

- Has been duly approved and adopted by the employer's governing body pursuant to public meeting laws;
- Identifies the position title for every employee position;
- Shows the payrate for each identified position, which may be stated as a single amount or as multiple amounts within a range;
- Indicates the time base, including, but not limited to, whether the time base is hourly, daily, bi-weekly, monthly, by-monthly, or annually;

^{1/} A copy of this regulation and a related circular was attached to the Closing Brief of Respondent.

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- Is posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer's internet website;
- Indicates an effective date and date of any revisions;
- Is retained by the employer and available for public inspection for not less than five years; and
- Does not reference another document in lieu of disclosing the payrate.

However, prior to its effective date, as stated above, Respondent left his employment at Cudahy and thus retroactive application of Section 570.5 was barred because of the *Ex Post Facto* doctrine.

The presumption against retroactive application of statutes is a well-settled legal principle. *Stockton Sav. & Loan Bank v. Massanet*, (1941) 18 Cal.2d 200, 203-05. Universally, courts have long maintained an aversion toward holding individuals accountable for the purported violation of laws that were non-existent at the time in issue. The United States Supreme Court has been notably emphatic in its espousal of the presumption against retroactivity. Perhaps the most powerful quote from the Court's cases on retroactivity is the following:

"It is contrary to fundamental notions of justice, and thus contrary to realistic assessment of probable legislative intent. The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks . . . by the Romans . . . by [the] English common law.,, and by the Code Napoleon... It has long been a solid foundation of American law." *Kaiser Aluminum & Chem. Corp. v. Bonjomo*, 494 U.S. 827, 855 (1990)."

The *Ex Post Facto* Clause, the Fifth Amendment's Takings Clause, the prohibition on "Bills of Attainder," and the Due Process Clause of the Fourteenth Amendment all reflect a general disfavor for retroactive legislation. *Landgraf v. USI Film Prods.*, (1994) 511 U.S. 244, 248. In particular, the Due Process Clause provides that an individual's interest in fair notice of what the law requires of him might be "compromised" by retroactive legislation. *Id.*

In its Closing Brief, CalPERS attempted to sidestep the problem of retroactivity by arguing that California Code of Regulation Section 570.5 merely "clarifies existing law." See Closing Brief, p. 6. Yet, CalPERS failed to cite a prior regulation that relates to a "Requirement for a Publicly Available Pay Schedule." As such, Section 570.5 did not clarify; rather, it changed or altered the existing statutory scheme.

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March 2, 2017

Page 5

In *McClung v. Employment Development Dept.*, (2004) 34 Cal.4th 467, 471-72, the California Supreme Court held:

"If the amendment merely clarified existing law, no question of retroactivity is presented. '[A] statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment' 'because the true meaning of the statute remains the same.' (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243, 62 Cal.Rptr.2d 243, 933 P.2d 507 (*Western Security Bank*)). In that event, personal liability would have existed at the time of the actions, and the amendment would not have changed anything. But if the amendment changed the law and imposed personal liability for earlier actions, the question of retroactivity arises. 'A statute has retrospective effect when it substantially changes the legal consequences of past events.' (*Ibid.*) In this case, applying the amendment to impose liability that did not otherwise exist would be a retroactive application because it would "attach[] new legal consequences to events completed before its enactment." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (*Landgraf*)). Specifically, it would 'increase a party's liability for past conduct....' (*Id.* at p. 280, 114 S.Ct. 1483; accord, *Myers v. Phillip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839, 123 Cal.Rptr.2d 40, 50 P.3d 751 (*Myers*))." [Emphasis added.]

Because Respondent performed the services required of him, and the effective date of Section 570.5 was *after* the termination of his employment, the regulation upon which CalPERS bases its position is inapplicable.

Conclusion

Based on the foregoing, Respondent's benefits should be reinstated and he should be reimbursed for amounts withheld, plus interest and attorneys' fees as provided by law.

Very truly yours,


Stanley L. Friedman

cc: Christopher C. Phillips, Esq.
Senior Staff Attorney
CalPERS Legal Office
(By email to Christopher.Phillips@calpers.ca.gov)

Matthew C. Sgnilek, Esq.
Kutak Rock LLP
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STANLEY L. FRIEDMAN

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March 2, 2017

Page 6

Mr. George A. Perez
(By email)

KUTAK ROCK LLP

S PARK PLAZA, SUITE 1500
IRVINE, CALIFORNIA 92614

949-417-0989
FACSIMILE 949-417-5394

FACSIMILE TRANSMISSION

DATE: March 3, 2017

To:

NAME:	FAX No.:	PHONE No.:
Cheree Swedensky, Assistant to the Board CalPers Executive Office	(916) 795-3972	

If you experience any problems in receiving these pages, please call (949) 417-0999 as soon as possible. Thank you.

FROM: Tiffany K. Ackley, Esq. **EMPL No.:** 5113

SECRETARY: Angela Campos

RE: *George Perez v. City of Cudahy*; Case No.: 2015-0666;
OAH No.: 2016050850

CLIENT NUMBER: 11317-221	
NUMBER OF PAGES, INCLUDING COVER PAGE: 5	CONFIRM: No

MESSAGE:

Ms. Swedensky: Please find attached Respondent's Argument of the City of Cudahy.

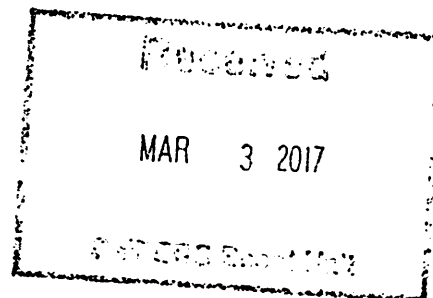
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Operator: _____

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<input type="checkbox"/>	7400 - International

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[Exempt from filing fees pursuant to
 Government Code Section 6103]



7 Attorneys for Respondent
 8 CITY OF CUDAHY

9 BOARD OF ADMINISTRATION

10 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

11 GEORGE A. PEREZ,
 12 Respondent,
 13
 14 and
 15 CITY OF CUDAHY,
 16 Respondent.

Case No.: 2015-0666
 OAH No.: 2016050850
 ALJ: David Rosenman

**RESPONDENT CITY OF CUDAHY'S
 WRITTEN ARGUMENT AGAINST THE
 PROPOSED DECISION**

Hearing: November 8, 2016

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 19
 20 Respondent CITY OF CUDAHY submits the following Written Argument Against the
 21 Proposed Decision.

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4826-0507-6036.1
 11317.221

1 **1. INTRODUCTION**

2 The proposed decision should be rejected for two reasons, to wit: (1) retroactive
3 application of the requirements embodied in 2 C.C.R. 570.5 is patently unfair and unduly
4 burdensome for the City; and (2) the proposed Director of Parks & Recreation pay rate utilized is
5 outdated and ignores the fact that Mr. Perez was employed as the city manager for 11 years
6 before retiring.

7 The proposed decision notes 570.5 became effective in August 2011. Mr. Perez retired in
8 March 2011 and submitted his application for benefits on September 2011. In effect, the
9 proposed decision would require public entities to comply with a law that is not yet effective.
10 The true question the proposed decision should address is whether the City was compliant with
11 the laws at the time Mr. Perez retired- not whether the City had followed laws that would not
12 exist until five months later.

13 Additionally, as is discussed below, the proposed decision uses an outdated and improper
14 pay rate in calculating Mr. Perez's benefits. Using this pay rate constitutes an abuse of
15 discretion.

16 **2. REGULATION 570.5 SHOULD NOT BE APPLIED RETROACTIVELY**

17 2 C.C.R. 570.5 was enacted on August 19, 2011, and should not be retroactively applied.
18 The proposed decision asserts 570.5 is a clarifying regulation as it relates to the requirement for a
19 "publically available pay schedule." [¶ 26, pg. 9.] However, nowhere does the statute
20 contemplate the term "publically available pay schedule" would be "clarified." The omission in
21 the statute of any need to clarify "publically available pay schedule" indicates it is not a mere
22 "clarifying" regulation.

23 570.5 goes far beyond mere *clarification*. The regulation completely changed what was
24 meant by "publically available pay schedule." It created new requirements to qualify as "a
25 publically available pay schedule." Consequently, documents that would have qualified as
26 publically available prior to the regulation's enactment were in jeopardy of no longer satisfying
27 the new requirements.

28 ///
4826-0507-6036.1
11317.221

1 By applying the requirements of 570.5 retroactively, the proposed decision would put an
2 onerous burden on public entities, such as the City of Cudahy- that they must anticipate whether
3 there will be any future changes in the law with respect to CALPERS benefits and must institute
4 those laws before they are enacted in order to protect its employees.

5 Regulation 570.5 went into effect in August 2011. Mr. Perez retired in March 2011 and
6 submitted his application for benefits in September 2011. The proposed decision would require
7 the City to comply with a law five months before it is enacted. Such a requirement is unduly
8 burdensome.

9 **3. IMPROPER PAY RATE WAS USED**

10 The proposed decision should be rejected because it fails to use the proper pay rate for Mr.
11 Perez.

12 The proposed decision utilizes a pay rate for the position of Director of Parks and
13 Recreation as of 2007/2008 as Mr. Perez's final pay rate, despite the fact that he was last
14 employed with the City in 2011.

15 Moreover, the proposed decision fails to utilize the salary of city manager- the position
16 Mr. Perez held for 11 years prior to retiring. Rather, the proposed decision uses the years old
17 salary for the Director of Parks & Recreation, a position Mr. Perez held for two months prior to
18 the eleven years he served as city manager. There is no reasonable explanation for using the
19 salary of the Director of Parks & Recreation as opposed to the salary of city manager.

20 **4. CONCLUSION**

21 For the reasons stated herein, the proposed decision should be rejected.

22 Dated: March 3, 2017

KUTAK ROCK LLP

By: 

Edwin J. Richards
Antoinette P. Hewitt
Tiffany K. Aokley
Attorneys for Respondent
CITY OF CUDAHY

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PROOF OF SERVICE
George Perez v City of Cudahy
CALPERS Case No. 2015-0666

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the City of Irvine in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 5 Park Plaza, Irvine, California 92614-8595.

On March 3, 2017, I served on all interested parties as identified on the below mailing list the following document(s) described as:

RESPONDENT CITY OF CUDAHY'S WRITTEN ARGUMENT AGAINST THE PROPOSED DECISION

[X] (BY MAIL, 1013a, 2015.5 C.C.P.) I deposited such envelope in the mail at Irvine, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, this(these) document(s) will be deposited with the U.S. Postal Service on this date with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Stanley L. Friedman, Esq. 445 S. Figueroa Street, 31st Floor Los Angeles California 90071-1631	Attorneys for Plaintiff, GEORGE PEREZ Tel: 213-629-1500 Fax: 213-232-4071
Matthew G. Jacobs, Esq. Christopher Phillips, Esq. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM Lincoln Plaza North 400 "Q" Street Sacramento, California 95811	Attorneys for CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM Tel: (916) 795-3675 Fax: (916) 795-3659

(STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 3, 2017, at Irvine, California.



Angela Campos